12

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1909~~ 1913

No. ~~199~~ 13

GEORGE E. TINKER, PLAINTIFF IN ERROR,

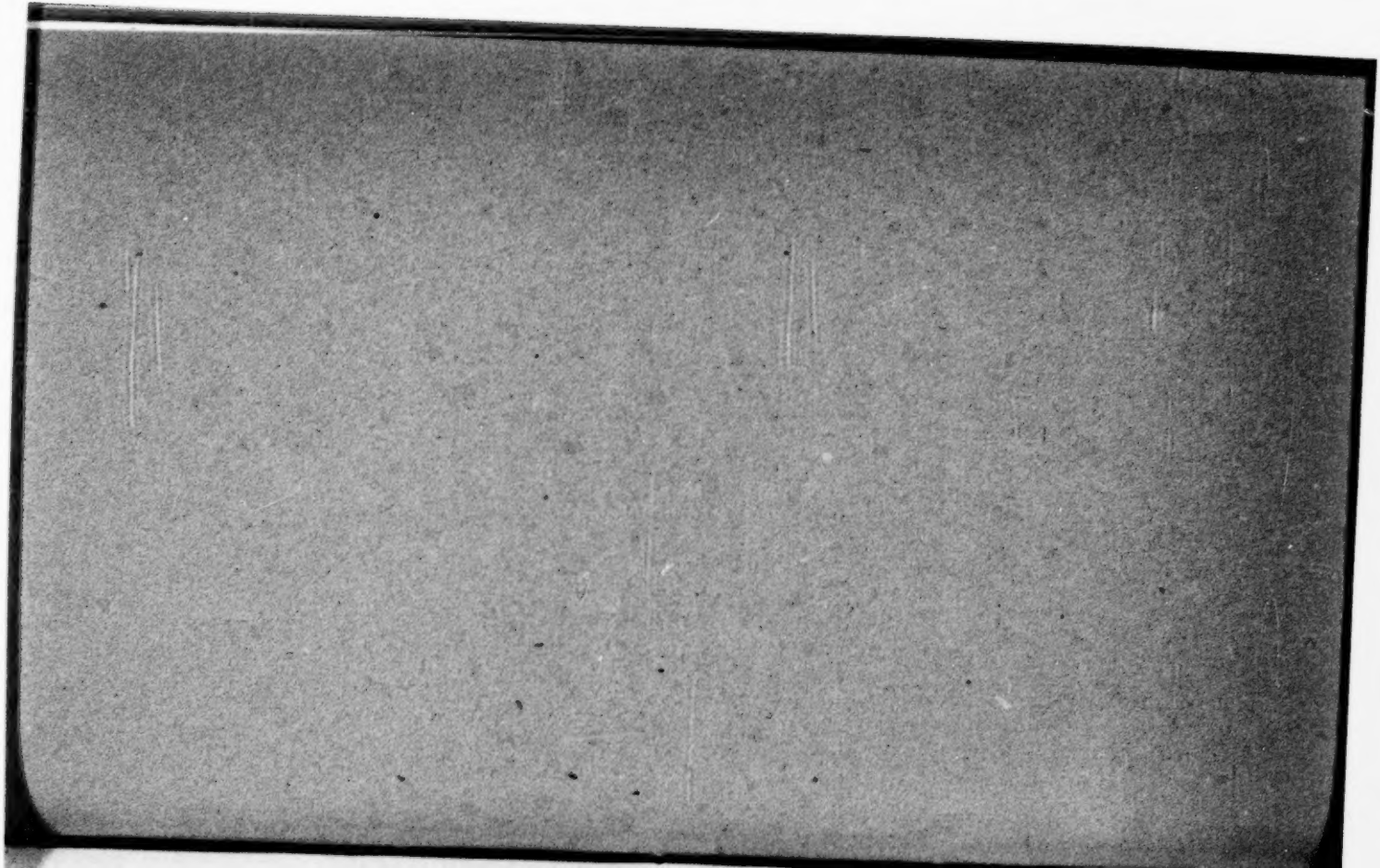
vs.

MIDLAND VALLEY MERCANTILE COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

FILED JULY 12, 1910.

(22,257)



(22,257)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1912.

No. 102.

GEORGE E. TINKER, PLAINTIFF IN ERROR,

vs.

MIDLAND VALLEY MERCANTILE COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

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1

Return to Writ.

UNITED STATES OF AMERICA,
Supreme Court of Oklahoma, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Oklahoma, in the City of Guthrie, this June 10, 1910.

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL,
Clerk Supreme Court of Oklahoma.
By W. M. BONNER, *Dep'y.*

Costs of Suit.

Plaintiff's Costs, $25.00, paid by Geo. E. Tinker.
Defendant's Costs, $1.75, paid by Midland Valley Mercantile Co.
Costs of Transcript, $26.80, paid by Geo. E. Tinker.

W. H. L. CAMPBELL,
Clerk Supreme Court of Oklahoma.
By W. M. BONNER, *Deputy.*

2

Certificate of Lodgment.

SUPREME COURT,
State of Oklahoma, ss:

I, W. H. L. Campbell, Clerk of the said Court, do hereby certify that there was lodged with me as such clerk on June 10, 1910, in the matter of Geo. E. Tinker versus Midland Valley Mercantile Co.,

1. The original bond, of which a copy is herein set forth.
2. Two copies of the writ of error, as herein set forth,—one for the defendant, and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Guthrie, Oklahoma, this June 10, 1910.

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL,
Clerk Supreme Court of Oklahoma.
By W. M. BONNER, *Deputy.*

3 *Citation.*

The President of the United States to the Midland Valley Mercantile Co., Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the Supreme Court of the State of Oklahoma, wherein Geo. E. Tinker is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Chief Justice of the Supreme Court of the State of Oklahoma, this 18" day of June, 1910.

JESSE J. DUNN,
Chief Justice Supreme Court of Oklahoma.

Attest:

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL,
Clerk Supreme Court of Oklahoma,
By W. M. BONNER, *Deputy.*

PAWHUSKA, OKLAHOMA, *June* 11, 1910.

I, attorney of record for the defendant in error in the above entitled case, hereby acknowledge due service of the above citation, and enter an appearance in the Supreme Court of the United States.

H. C. HARGIS,
Attorney for Midland Valley Mercantile Co.

[Endorsed:] Filed Jun- 18, 1910. W. H. L. Campbell, Clerk.

4 Supreme Court of Oklahoma.

No. —.

GEORGE E. TINKER, Plaintiff in Error,
vs.
MIDLAND VALLEY MERCANTILE CO., a Corporation, Defendant in Error.

Petition for Writ of Error, Assignment and Prayer.

Considering himself aggrieved by the final decision of the Supreme Court in rendering judgment against him in the above entitled case, the plaintiff in error hereby prays a writ of error from the said decision and judgment to the U. S. Supreme Court, and an order fixing the amount of a supersedeas bond.

And the said George E. Tinker assigns the following errors in the records and proceedings of the said case:

The Supreme Court of the State of Oklahoma erred in holding that the note, the basis of this action, was valid, and in refusing to hold that said note was void, under the provisions of the Act of Congress of March 3, 1901, 31 Stat. L. 1065, 1066, and the amendment thereof by Act of Congress of June 21, 1906, 34 Stat. L. 336.

The said errors are more particularly set forth as follows:

The record shows that plaintiff in error is an Osage Indian, and that defendant in error was a licensed Osage Indian Trader from April 3, 1906, to April 3, 1907, during which time the note in question was executed. That the purpose of the said acts was to liquidate the indebtedness of the Osage Indians, and to thereafter prohibit the Traders from extending credit to any individual Osage in excess of a certain per centum of the next quarterly annuity to which such Indian would be entitled. That defendant in error was prohibited by said act, and the rules and regulations of the Department of the Interior promulgated thereunder, from extending to the plaintiff in error credit in excess of seventy-five per centum of the next quarterly annuity to which he would be entitled.

The record shows that the credit extended to plaintiff in error at the time of the execution of the said note was largely in excess of seventy-five per centum of the next quarterly annuity to which plaintiff in error was entitled, and almost equaled the annuities to which plaintiff in error was entitled during the entire year covered by defendant in error's license as an Indian Trader. That the said note was therefore void, and the Supreme Court of the State of Oklahoma erred in refusing to so hold.

For which errors the plaintiff in error, George E. Tinker, prays that the said judgment of the Supreme Court of the State of Oklahoma, dated November 9, 1909, be reversed and a judgment rendered in favor of the plaintiff in error and for costs.

R. B. BOONE,
Attorney for George E. Tinker.

STATE OF OKLAHOMA,
Supreme Court, ss:

Let the writ of error issue upon the execution of a bond by George E. Tinker, Plaintiff in Error, to the Midland Valley Mercantile Co., Defendant in Error, in the sum of Three Thousand Dollars; such bond when approved to act as a supersedeas.

Dated June 15", 1910.

JESSE J. DUNN,
Chief Justice Supreme Court of Oklahoma.

Attest:

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL, *Clerk.*
By W. M. BONNER, *Deputy.*

[Endorsed:] Filed Jun- 18, 1910. W. H. L. Campbell, Clerk.

6 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Oklahoma, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Geo. E. Tinker and Midland Valley Mercantile Co., a corporation, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened, to the great damage of the said Geo. E. Tinker, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the

7 United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 18th day of June, in the year of our Lord one thousand nine hundred and ten.

[The Seal of the Circuit Court of the United States, Western District of Oklahoma.]

HARRY L. FINLEY,
Clerk Circuit Court United States, Western District of Oklahoma.

Allowed:

JESSE J. DUNN,
Chief Justice Supreme Court of Oklahoma.

[Endorsed:] Filed Jun- 18, 1910. W. H. L. Campbell, Clerk.

8 Copy.

GEO. E. TINKER, Plaintiff in Error,
vs.
MIDLAND VALLEY MERCANTILE CO., Defendant in Error.

Bond.

Know all men by these presents, That we, Geo. E. Tinker, as principal, and Charles Martin and John L. Freeman, as sureties, are held and firmly bound unto Midland Valley Mercantile Co. in the sum of Three Thousand Dollars, to be paid to the said Midland Valley Mercantile Co., to which payment, well and truly to be made, we bind ourselves jointly and severally firmly by these presents.

Sealed with our seals, and dated this 4th day of June, 1910.

Whereas, the above-named plaintiff in error seeks to prosecute his writ of error to the U. S. Supreme Court to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Oklahoma.

Now, Therefore, The condition of this obligation is such, that if the above-named plaintiff in error shall prosecute his said writ of error to effect, and answer all costs and damages that may be adjudged if he shall fail to make good his plea, then this obligation to be void, otherwise to remain in full force and effect.

GEO. E. TINKER, *Principal.*
CHARLES MARTIN,
JOHN L. FREEMAN,
Sureties.

STATE OF OKLAHOMA,
Osage County, ss:

9 Charles Martin, and John L. Freeman, being each duly sworn, on oath depose and say: We are each of lawful age and are citizens of the State of Oklahoma, and know the contents of the foregoing instrument to which we have attached our names. We each for himself say we are worth the sum of Three Thousand Dollars over and above all debts, liabilities and exemptions.

CHARLES MARTIN.
JOHN L. FREEMAN.

Subscribed and sworn to before me this 4th day of June, A. D. 1910.

[SEAL.] GEO. M. TREDWAY,
Notary Public, Osage County, Oklahoma.

My Commission expires 2/8/12.

Bond agreed to be satisfactory:
H. C. HARGIS,
Attorneys for Defendant in Error.

Bond approved, and to operate as a supersedeas.
JESSE J. DUNN,
Chief Justice Supreme Court of Oklahoma.

[Endorsed:] Filed Jun- 18, 1910. W. H. L. Campbell, Clerk.

10 EXHIBIT "A."

STATE OF OKLAHOMA,
Osage County:

In the District Court Held within and for Osage County, State of Oklahoma.

MIDLAND VALLEY MERCANTILE CO., Plaintiff,
vs.
GEO. E. TINKER, Defendant.

Case Made.

Be it remembered, that heretofore, to wit, on the 22nd day of June, A. D. 1907, the plaintiff, the Midland Valley Mercantile Company commenced this action against the defendant, Geo. E. Tinker, by filing in the office of the Clerk of the District Court within and for said State and County its petition which is in the words and figures following, to wit:

Filed the 2 day of May, 1908.

L. M. POE,
Judge of the District Court of said County.
By —— ——, *Clerk.*

Filed May 12, 1908. W. H. L. Campbell, Clerk of the Supreme Court, By —— ——, Deputy.

11 In the District Court of Pawnee County, Okla. Territory, Sitting at Pawhuska, in the Osage Indian Reservation.

MIDLAND VALEY MERCANTILE COMPANY, Plaintiff,
vs.
GEO. E. TINKER, Defendant.

Petition.

The plaintiff states, that plaintiff is a corporation organized and existing under and by virtue of the laws of Oklahoma, and has its principal place of business at Pawhuska in said Territory; that defendant is an Osage Indian and resides on the Osage Reservation; that on the 1st day of Sept. 1907, the defendant made, executed, and for a valuable consideration delivered to plaintiff his promissory note of that date whereby and under the terms of which he promised to on Oct. 1st after the date thereof (promised to pay) plaintiff $922.50, together with interest thereon at the rate of 10% per annum therein from date till paid. That a copy of said note is hereto attached and made a part of this petition, and marked "Exhibit A."

That the plaintiff is now the owner and holder of said note, and the same is due and wholly unpaid; that there is a provision in

said note, if suit be instituted we agree that judgment be rendered for 10% of the principal and $10 additional as att'ys fees.

Wherefore, plaintiff prays judgment against the defendant for $996.83, principal and interest and the further sum of $109.68 att'ys fees for this suit and that said judgment bear interest at the rate of 10% per annum and costs of suit.

H. C. HARGIS,
Att'y for Plaintiff.

12 $922.50/100. PAWHUSKA, *Sep. 1st*, 1906.

Oct. 1st, 1906, after date without grace I promise to pay to the Midland Valley Merc. Co. or order Nine Hundred Twenty two & 50/100 Dollars, for value received, negotiable and payable at Pawhuska, Oklahoma, without defalcation or discount, with 10 per cent interest, per annum from date until paid. The interest, if not paid when due to become part of the principal and bear same rate of interest.

The several signers, guarantors or endorsers of this note hereby expressly waive all rights which may inure to them as sureties, guarantors or endorsers by reason of extension of the time of payment to the maker, or delay in the collection, or failure of demand, protest or notice, at maturity of this note by the payee. If suit be instituted we agree that judgment be rendered for ten per cent. of the principal and ten dollars additional as attorneys' fee.

Exhibit "A." GEO. E. TINKER.

Endorsed on back: No. 303. Midland Valley Mercantile Co. v. Geo. E. Tinker. Petition. Filed this 22nd day of June, 1907, Charles L. Watson, clerk of Dist. Court by E. N. Yates, Deputy Clerk. H. C. Hargis, Att'y for pl't'ff.

13 And on the 10th day of September, 1907, the defendant filed a demurrer:

In the District Court of Pawnee, Oklahoma Territory, Sitting at Pawhuska, in the Osage Indian Reservation.

MIDLAND VALLEY MERCANTILE COMPANY, Plaintiff,
vs.
GEORGE E. TINKER, Defendant.

Demurrer.

Comes now George E. Tinker, the defendant, and demurs to the complaint, and for cause of demurrer says:

That the complaint does not state facts sufficient to constitute a cause of action.

BOONE, PALMER & MACDONALD,
Attorneys for Defendant.

This demurrer is endorsed on the back as follows, omitting the heading.

No. 303. Demurrer to petition. Filed this 10th day of September, 1907. Chas. L. Watson, Clerk Dist. Court. By E. W. Yates, Deputy Clerk,

14 Demurrer having been overruled in this cause the defendant was allowed time to answer, and within said time defendant answers as follows, to wit:

In the District Court of Pawnee County, Okla. Territory, Sitting at Pawhuska, in the Osage Indian Reservation.

MIDLAND VALLEY MERCANTILE COMPANY, Plaintiff,
vs.
GEORGE E. TINKER, Defendant.

Answer.

Comes now the defendant, George E. Tinker, and for answer to the petition herein says:

1. That each and every allegation of each and every paragraph of the petition is untrue and denied except as herein admitted.

2. It is admitted that the defendant is an Osage Indian and resides on the Osage Indian Reservation.

3. It is admitted that the plaintiff is a corporation.

4. It is admitted that defendant executed a note to plaintiff but not as alleged in the petition.

For a further defense the defendant says:

That at the time he executed a note to defendant, it was licensed by the United States Government to trade with the Indians within the Osage Indian Country; that the plaintiff as such licensed trader had from time to time extended credit to defendant as an individual and as head of the family; for goods, wares and merchandise largely in excess of 75% of the next quarterly annuity due after extending such credit to defendant, and said note was given as evidence

15 of such excess indebtedness. That said plaintiff claimed that defendant was indebted to it in the sum sued for over and above 75% of said annuities which had theretofore accrued and which was next thereafter to accrue.

That said note was given for the credit extended over and above the 75% of said annuity, and said note was at the time of its execution over and above 75% of the said annuities accruing next after the extension of said credit.

That the consideration of the said note was illegal and the note is void and defendant pleads such illegality in bar of a recovery.

Wherefore, defendant demands judgment, that said note being given for an illegal consideration is void and no recovery can be had thereon. That plaintiff take nothing by its suit and defendant recover costs of plaintiff. For such other and further relief.

BOONE, PALMER & MACDONALD,
Att'ys for Def't.

On the back of said "Answer", omitting the title to said cause, appears the following endorsements:

No. 303. Answer. Filed this 1st day of October, 1907. Chas. L. Watson, Clerk Dist. Court, by E. N. Yates, Deputy Clerk.

16 Thereafter, to wit, on the 15th day of February, 1908, the plaintiff replied as follows:

In the District Court of Pawnee County, Sitting at Pawhuska, in the Osage Indian Reservation, Oklahoma Territory.

MIDLAND VALLEY MERCANTILE COMPANY, Plaintiff,
vs.
GEORGE E. TINKER, Defendant.

Reply.

Comes now the plaintiff herein and for its reply to the answer of the defendant says it denies each and every allegation the said answer contained.

H. C. HARGIS,
Attorneys for Plaintiff.

On the back of said "Reply", omitting the title, to said cause, appears the following endorsements:

Plaintiff's reply to defendant's answer. Filed in the District Court Feb. 15th, 1908. Thos. Leahy, Jr. Clerk.

17 That on the 28th day of February, 1908, this cause came on for hearing, the same being one of the regular judicial day of the February, A. D. 1908 term of the District Court of Osage County, Oklahoma, and was tried upon its merits, the plaintiff appearing in person and by his attorney, H. C. Hargis, and the defendant appearing by his attorneys, Boone, Palmer & Macdonald, and thereupon twelve good and lawful men from the body of the said County of Osage and State of Oklahoma were called, qualified and sworn to well and duly try the said cause: That thereupon, after the reading of the pleadings, his Honor L. M. Poe, Judge of the said Court, held and ruled and so ordered that the burden of proof was upon the defendant, to which ruling and order the defendant in apt time excepted and assigned the same as error; that thereafter the defendant introduced the following witnesses, to wit:

1st. George E. Tinker, the defendant, called in his own behalf as a witness, having been first duly cautioned, examined and solemnly sworn to testify the truth, the whole truth and nothing but the truth, testified as follows, to wit as set out in the evidence as certified to by the official stenographer, and by his Honor, L. M. Poe, which evidence is hereby referred to and made a part of this case made.

2nd. Thereafter H. C. Ripley having been first duly cautioned, examined and solemnly sworn to testify the truth, the whole truth and nothing but the truth, to wit: as set out in the evidence as cer-

tified to by the official court stenographer, and by his Honor L. M. Poe, which evidence is hereby referred to and made a part of the case made: The evidence of each of said witnesses being as follows:

18 Osage District Court.

MIDLAND VALLEY MERCANTILE CO., Plaintiff,
vs.
GEO. E. TINKER, Defendant.

Bill of Evidence and Exceptions.

Hon. L. M. Poe, Presiding.

Appearances:

Mr. H. C. Hargis, for plaintiff.
Boone, Palmer & MacDonald, for defendant.
Jesse J. Worten, official stenographer.

Be it remembered, that, heretofore, to wit: the 28th day of February, A. D. 1908, the following evidence was heard at the above styled action.

Mr. GEO. E. TINKER, the defendant, is first called and being duly sworn, testifies as follows:

Q. You may state your name?
A. Geo. E. Tinker.
Q. Are you the defendant in this case?

By Mr. HARGIS: Plaintiff at this time desires to object to any evidence being introduced in this case.
By the COURT: Objection is overruled.
Mr. HARGIS: Exception.

A. Yes, sir.
Q. Mr. Tinker you are an Osage Indian?
A. I am.
19 Q. In September, 1906, were you a member of the Tribe of Osage Indians?
A. I was.
Q. Were you a married man at that time?
A. Yes sir.
Q. And had a family?
A. Yes sir.
Q. How many had you in your family at that time?
A. Seven in all.
Q. You had that many on September 1st, 1906?
A. Yes sir.
Q. Mr. Tinker when was the payment had, the quarterly payment to Osage Indians in 1906?
A. My recollection is it was along about the 4th.

Q. The 4th of what month?
A. September.
Q. When was the last payment made before that time to the Osage Tribe of Indians?
A. Some time about three months before that time.
Q. Can you state how much you drew or were entitled to draw from the Government by virtue of annuities, both as the head of a family and individually, on September 1st, 1906?

Mr. HARGIS: We object for the reason that it is irrelevant, incompetent and immaterial.
By the COURT: Objection is overruled.
Mr. HARGIS: Exception.

A. $46.00 per head and there were seven members of the family.
Q. As a member of the Osage Tribe, and as individually, and as the head of a family, how much was your quarterly payment next after September, 1st, 1906.

Mr. HARGIS: Now we object to that question.
20 By the COURT: Overruled.
Mr. HARGIS: Exception.

A. I think about $280.00 as the head of a family, it was about that.
Q. Was it as much as $922.00?
A. No, sir.

Stand aside.

Mr. H. C. RIPLEY is called by defendant and being duly sworn, testifies as follows:

Mr. BOONE questions witness:

Q. You may state your name?
A. H. C. Ripley.
Q. I believe you are the Trade Supervisor for the Osage Tribe of Indians?
A. I am.
Q. On September 1st, 1906, can you state whether or not the Midland Valley Mercantile Company was a licensed trader in the Osage Indian Reservation?

Mr. HARGIS: We object unless it is first shown that he has the records in his possession, and if so let him produce them.
By the COURT: Objection will be sustained.
Mr. BOONE: Exception.

Q. Have you with you any of the records showing the traders at that time?
A. No.
Q. Can you get them Mr. Ripley?
A. Yes, sir.

(Witness is given ten minutes to procure the records.)

21 Q. Have you in your possession the records showing traders with the Osage Indians upon this Reservation in 1906?

A. I have my list of the traders.

Q. Will you turn to it please and state what the records show as to the Midland Valley Mercantile Company on September 1st, 1906?

Mr. HARGIS: We object for the reason that it is not competent evidence.

By the COURT: Objection is overruled.

Mr. HARGIS: Exception.

A. Their license was granted on the 3rd day of April, 1906, and expired on the 3rd day of April, 1907.

Mr. HARGIS: Now we move to withdraw the above answer from the consideration of the jury.

By the COURT: Your motion is overruled.

Mr. HARGIS: Exception.

Q. As Trade Supervisor is it a part of your duty, your official duty, to keep a record in your office of the traders with the Indians. Licensed traders of course?

Mr. HARGIS: We object for the reason that this is incompetent, and not the best evidence.

By the COURT: Objection is overruled.

Mr. HARGIS: Exception.

A. I have to keep a record of all licensed traders.

By the COURT:

Q. He asked you if it was your duty?

A. Yes, sir.

Q. You kept this record correctly?

A. Yes, sir.

22 Cross-examination by Mr. HARGIS:

Q. Mr. Ripley where are the applications filed, and with what office, for a trader's license?

A. They are filed with Secretary of Indian Affairs at Washington.

Q. Do you know whether that office issues a paper or certificate or not?

A. They do.

Q. You are not the custodian of that certificate?

A. No, sir.

Q. From what office did you obtain the list that you had, that you testified to in this case?

A. When the Agent receives a license he gives it to me and it is placed in the files.

Q. And you have that record that you had recorded?

A. Yes, sir.

Q. You may refer to your record and tell the jury what that contains?

A. It contains the name of the firm and the date of the license.
Q. I wish you would kindly refer to it and read what it says?
A. Midland Valley Mercantile Company, Agent's license, 4/2/06 to 4/2/07.
Q. You understand that the Midland Valley Mercantile Company was a corporation?
A. No I don't know.
Q. Did the department license corporations to trade with Indians?
A. They were there.

Stand aside.

23 Now comes plaintiff and interposes a demurrer to the evidence in this case.

By the COURT: The demurrer to the evidence will be sustained. To which defendant is given his exceptions.

STATE OF OKLAHOMA,
County of Osage, set:

I, Jesse J. Worten, Official Court Reporter in and for the State and County aforesaid, certify that the foregoing bill of evidence and exceptions, contains all the evidence that was submitted to the court and jury, both oral and written, at the trial of the action wherein the Midland Valley Mercantile Co., is plaintiff, and Geo. E. Tinker is defendant.

I further certify that this is a full, complete and accurate transcript of said evidence.

In witness whereof I have hereunto set my hand, this the 4th day of March, 1908.

JESSE J. WORTEN,
Official Court Reporter.

24 I, L. M. Poe, Judge of the Osage District Court, certify that I have examined the foregoing bill of evidence and exceptions mentioned in the above certificate of the official court reporter, and find that it is a full, complete and accurate transcript of all the evidence submitted at the trial of the aforesaid action, containing all the rulings of the court with the objections and exceptions. I further certify that I approve said Bill of Evidence and Exceptions and order that same be filed and made a part of the record in this case.

Witness my hand, this the 4th day of March, 1908.

L. M. POE, *Judge.*

George E. Tinker and H. C. Ripley were the only witnesses who testified in said cause, and the evidence as hereinbefore set out and certified by the official court stenographer and the Judge of the said Court, contains all the evidence offered by either side in the trial of said cause.

25 And after said testimony of said Ripley the defendant rests his case, that thereupon the plaintiff filed in said Court

in said cause its demurrer to the said evidence of the plaintiff, which said demurrer is in the words and figures following, to wit:

In the District Court of Osage County, Oklahoma.

MIDLAND VALLEY MERCANTILE COMPANY, Plaintiff,
vs.
GEORGE E. TINKER, Defendant.

Demurrer.

Comes now the plaintiff herein and demurs to the evidence offered by the defendant in this action, for the reasons and upon the ground that admitting the evidence to be true for the purposes of the demur- the same states no defense to plaintiff's cause of action.

H. C. HARGIS,
Attorney for Plaintiff.

On the back of said demurrer appears the following endorsements (Omitting title):

Filed this 27th day of Feb. 1908. Thos. Leahy, Jr. Clerk Dist. Court. By Geo. L. Boone, Deputy Clerk. Demurrer to Evidence. Filed this 27th day of Feb'y 1908. Thos. Leahy, Jr. Clerk Dist. Court. H. C. Hargis.

26 That thereupon said demurrer came on for hearing, and after the argument of the counsel thereon, the Court, being fully advised in the premises sustained said demurrer: to the ruling of said Court, the defendant then and there in apt time duly excepted to the said ruling.

Then came the plaintiff and moved the court for judgment in its favor and against the defendant according to the prayer of the petition, and the defendant moved the Court to direct the verdict in his favor unless the plaintiff introduced evidence to contradict the evidence offered by the defendant.

This motion of the defendant was overruled and the defendant excepted in apt time.

Court then sustained the motion of the plaintiff, to which ruling defendant in apt time excepts.

27 That at the proper time, and on the 28th day of February, 1908, and within three days after the sustaining of the plaintiff's motion as here-before set out, and during the said term of said District Court defendant filed in said court in said cause its motion for a new trial, which said motion is as follows, to wit:

28 In the District Court of Osage County, State of Oklahoma.

MIDLAND VALLEY MERCANTILE COMPANY, Plaintiff,
vs.
GEO. E. TINKER, Defendant.

Motion for New Trial.

Comes now the defendant and moves the court to grant a new trial in this cause for the reason that the Court erred in sustaining the demurrer to evidence, and for the further reason that the Court erred in not granting the defendant's motion directing the jury to return a verdict in favor of the defendant.

That thereafter, to wit, on the 28 day of February, 1908, and during said term of said Court said motion of said defendant for a new trial came on for hearing, and after the argument of the counsel thereon, and on the said day, the Court being fully advised in the premises, overruled said motion for a new trial, and refused to grant said defendant a new trial, to which action of the Court in overruling said motion for a new trial, and in refusing to grant the defendant a new trial, said defendant then and there duly excepted in apt time; that thereafter, to wit, on the 28 day of Febr'y 1908, and during said term of said Court, the court proceeded to, and did make and render judgment against said defendant, and in favor of the plaintiff, for the sum of $—, principal and interest, and the further sum of $— attorney's fees, and the further sum of $— as costs of this action; to which action of the court, in making and rendering said judgment, and each and every part thereof, said defendant then and there duly excepted at the time; that the
29 court, on the day last aforesaid, immediately after the overruling of the motion for a new trial, and during said term of said Court, and for good cause shown, granted said defendant 50 days from said 28 day of Feb'y 1908, in which to prepare, and serve upon the plaintiff a record and case made for the Supreme Court, the plaintiff to have 10 days thereafter in which to serve and suggest amendments thereto, and the same to be settled on 10 days' notice by these parties; supersedeas bond fixed at $1000.00 to be approved by the Clerk of this court.

Which said judgment so rendered as hereinbefore stated, is in the words and figures following, to wit:

30 In the District Court of Osage County, Oklahoma.

MIDLAND VALLEY MERCANTILE COMPANY, Plaintiff,
vs.
GEORGE E. TINKER, Defendant.

Journal Entry.

On this 27th day of February, 1908, the same being one of the regular judicial days of the February term of the Court, this cause comes on for hearing on the regular call of the docket.

The plaintiff appeared by Hargis & Hill, its attorneys, and the Defendant appeared in person and by Boone, Palmer & MacDonald, his attorneys, and the Court finds that this is an action brought upon a promissory note, and that the execution thereof is not denied, and that the burden is upon the defendant in this action.

A jury of twelve good and lawful men are duly impaneled by the Court and found qualified in all respects, and both plaintiff and defendant accepts the jury.

Thereupon the defendant offers his evidence and rests, and the plaintiff offers hes demur- to the evidence of the defendant for the reason that if the said evidence be true the same proves no defense to the plaintiff's cause of action, and the same is argued by the counsel for the plaintiff and the defendant, and the court being fully advised in the premises sustains said demur- to the sustaining of which demur- the defendant excepts.

Thereupon the court orders that the jury in this case be, and the same is hereby discharged.

31 Wherefore, it is ordered, decreed and adjudged by the court that the plaintiff, the Midland Valley Mercantile Company, a corporation, have and recover of and from the defendant, George E. Tinker, the sum of One Thousand and Sixty Dollars and eighty-five cents, ($1065.85) principal and interest on the said note to this date, and the further sum of one hundred and two dollars and Twenty-five cents ($102.25) attorney's fees as provided for in the note sued upon in this action, and the costs of the action taxed at $11.09, and that this judgment bear interest at the rate of 10% per annum from this date, and hereof let execution issue.

And thereafter to wit on the — day of — 1908, and within three days from the rendition of this judgment the defendant advances his motion for a new trial, and said motion is considered by the court, and the arguments for counsel for plaintiff and defendant heard, and the Court overrules said motion to the overruling of which the defendant then and there excepts.

L. M. POE, *Judge.*

O. K.
H. C. HARGIS,
Attorney for Plaintiff.

—— ——,
Attorney for Defendant.

Filed May 12, 1908. W. H. L. Campbell, Clerk of the Supreme Court. By —— ——, Deputy.

32 STATE OF OKLAHOMA,
Osage County, ss:

In the District Court of said County and State.

MIDLAND VALLEY MERCANTILE COMPANY, Plaintiff,
vs.
GEORGE E. TINKER, Defendant.

To the above named defendant in error and his attorney of record, H. C. Hargis:

The above and foregoing case made is hereby tendered to and served upon you, and each of you, as a true and correct case made in the above entitled cause, and as a true and correct statement and complete transcript of all the pleadings, motions, orders, findings, evidences, judgments and proceedings in the above entitled cause.

BOONE, PALMER & MACDONALD,
Attorneys for Plaintiff in Error.

I hereby accept and acknowledge due, legal and timely service of the above and foregoing case made on me this 1 day of Apr. 1908.

H. C. HARGIS,
Attorney for Plaintiff, Def't in Error.

Filed May 12, 1908. W. H. L. Campbell, Clerk of the Supreme Court.

The foregoing case is correct.

H. C. HARGIS,
Attorney for Def't in Error.

Filed May 12, 1908. W. H. L. Campbell, Clerk of the Supreme Court.

33 The foregoing sets out fully and correctly all of the pleadings filed in said cause, all motions filed or made, and all rulings and orders made thereon; all exceptions taken by the defendant to such rulings and orders were in apt time and allowed, and the same is a true and correct statement, and complete transcript of all the pleadings, motions, findings, evidence, orders, rulings and judgments and other proceedings in said cause.

Filed May 12, 1908. W. H. L. Campbell, Clerk of the Supreme Court. By —— ——, Deputy.

34 STATE OF OKLAHOMA,
Osage County:

In the District Court of said County and State.

MIDLAND VALLEY MERCANTILE COMPANY, Plaintiff,
vs.
GEORGE E. TINKER, Defendant.

We, the undersigned, attorneys of record for the above named defendant in error, do hereby waive notice to us of the time and place of presentation of the above and foregoing case made to the Judge of the said District Court before whom said case was tried for settlement and signing, and hereby agree that said case made may be presented to said Judge for settlement and signing, and be settled and signed and allowed by said Judge at such time as it may suit his convenience to do so.

H. C. HARGIS,
Attorneys for Defendant in Error.

Filed May 12, 1908. W. H. L. Campbell, Clerk of the Supreme Court.

35 STATE OF OKLAHOMA,
Osage County:

In the District Court of said County and State.

MIDLAND VALLEY MERCANTILE CO., Plaintiff,
vs.
GEORGE E. TINKER, Defendant.

Be it remembered, that on the 2 day of May, 1908, the same being the time appointed and agreed upon by counsel for signing and settling of the case on appeal at the court house in the City of Pawhuska, in the County of Pawhuska, in the State of Oklahoma, the above and foregoing case made was presented to me, L. M. Poe, Judge of the District Court of said Osage County, before whom said cause was heard, to be settled and signed as the original case made herein as required by law, by the parties of said cause; and it appearing to me that said case made has been duly made and served upon the defendant within the time fixed by the order of this Court, and in the time and in the manner provided by law; that said plaintiff was present by his attorney, H. C. Hargis, and the defendant by his attorneys, Boone, Palmer & MacDonald, and said case made, having been examined by me is true and correct, and contain a true and correct statement and complete transcript of all the pleadings, motions, orders, findings, evidence and rulings, judgments and proceedings in said cause, I hereby allow, certify and sign the same as a true and correct case made in said cause, and hereby order

that the Clerk of said Court attest the same with his name and the seal of the said Court and file the same of record as provided by law.

Witness my hand this the 2d day of May, 1908.

L. M. POE,
Judge of the 21st Judicial District of Oklahoma.

36 Attest:

[SEAL.] THOS. LEAHY, JR.,
Clerk of the District Court of Osage County, Oklahoma.

Filed May 12, 1908. W. H. L. Campbell, Clerk of the Supreme Court.

37 STATE OF OKLAHOMA,
Osage County:

In the District Court of said County and State.

MIDLAND VALLEY MERCANTILE COMPANY, Plaintiff,
vs.
GEORGE E. TINKER, Defendant.

I, H. C. Hargis, the undersigned attorney for the defendant in error hereby waive the issuing and service of summons in error in the above entitled cause.

H. C. HARGIS,
Attorney for Def't in Error.

Filed May 12, 1908. W. H. L. Campbell, Clerk of the Supreme Court. By —— ——, Deputy.

38 In the Supreme Court of the State of Oklahoma.

MIDLAND VALLEY MERCANTILE COMPANY, Defendant in Error,
vs.
GEORGE E. TINKER, Plaintiff in Error.

Petition in Error.

Comes now the plaintiff in error, Geo. E. Tinker, and for his cause of action in error alleges and avers:

That on the 28th day of February, 1908, in a cause pending in the District Court of the County of Osage and Territory of Oklahoma, where the defendant in error, the Midland Valley Mercantile Company was plaintiff, and this plaintiff in error, George E. Tinker, was defendant, the plaintiff in said court below, by the consideration of said court recovered judgment against the defendant of the court below this plaintiff in error for the sum of $1060 85 principal and interest, together with the costs of action in that behalf expended, and the said judgment, together with all pleadings, process,

procedure, evidence, rulings and proceedings of every kind and character taken and had by the Court in said cause wherein the judgment was rendered, are all preserved in a case duly made, served, signed and settled, which said case made is hereto attached, marked "Exhibit A" and hereby made a part of this petition in error.

The plaintiff in error alleges that in the proceedings resulting in said judgment there is manifest error to the substantial prejudice of the rights of this plaintiff in error in the following, to wit:

39 1st. The court erred in sustaining the demurrer to the evidence interposed by the plaintiff in error, which was duly excepted to as required by law.

2nd. For a further reason, that the Court erred in not granting the plaintiff's in error motion directing the jury to return a verdict in favor of the plaintiff in error, to the rulings of the said court in refusing to so direct the plaintiff in error duly excepted and assign the same as error.

3rd. That the court erred in overruling the motion made by the defendant in the court below for a new trial.

4th. The court erred in rendering judgment as set out in said cause, to each of which rulings and orders complained of the defendant duly excepted as shown by the case made.

Wherefore, the plaintiff in error prays that this court will examine the alleged errors, reversing said cause and remanding the same for a new trial, and for such other and further relief as to the court may seem just and right.

BOONE, PALMER & MACDONALD,
Att'ys for Plaintiff in Error.

Filed May 12, 1908. W. H. L. Campbell, Clerk of the Supreme Court. By —— ——, Deputy.

40 STATE OF OKLAHOMA,
Osage County:

In the District Court Held Within and for Osage County, State of Oklahoma.

MIDLAND VALLEY MERCANTILE CO., Plaintiff,
vs.
GEO. E. TINKER, Defendant.

I, Thos. Leahy, Jr. Clerk of the District Court for said County, do hereby certify that the foregoing is a full, true and correct transcript of the record in the above entitled cause.

In testimony whereof I have hereto set my hand and the seal of the court this the 2nd day of May, 1908.

[SEAL.] THOS. LEAHY, JR., *Clerk.*

Filed May 12, 1908. W. H. L. Campbell, Clerk of the Supreme Court. By —— ——, Deputy.

41 Endorsed on the back as follows, to wit:
No. 190. Midland Valley Mercantile Co. v. G. E. Tinker. Case made.
Service of this case made on appeal is hereby fully accepted as if same had been served by the Sheriff or other proper person.

H. C. HARGIS,
Att'y for Defendant in Error.

#190.

Filed May 12, 1908. W. H. L. Campbell, Clerk of the Supreme Court. By —— ——, Deputy.

42 And afterwards, at the May, 1909, Term of said Supreme Court, on the 12th day of May, 1909, the following proceeding was had in said cause, to wit:

#190.

GEORGE E. TINKER, Plaintiff in Error,
vs.
MIDLAND VALLEY MERCANTILE COMPANY, Defendant in Error.

And now this cause is submitted on the record and briefs filed herein.

43 And afterwards, at the May, 1909, Term of said Supreme Court, on the 6th day of July, 1909, the following proceeding was had in said cause, to wit:

#190.

GEORGE E. TINKER, Plaintiff in Error,
vs.
MIDLAND VALLEY MERCANTILE COMPANY, Defendant in Error.

Ordered by the Court, that plaintiff in error in the above cause be allowed to number pages of case made.

44 And afterward, at the July, 1909, Term of said Court, on the 13th day of July, 1909, the following proceeding was had in said cause, to wit:

#190.

GEORGE E. TINKER, Plaintiff in Error,
vs.
MIDLAND VALLEY MERCANTILE COMPANY, Defendant in Error.

Ordered by the Court, that the motion to dismiss in the above cause be, and the same is hereby overruled.

45 And thereafter, at the July, 1909, Term of said Supreme Court, on the 13th day of July, 1909, the following proceeding was had in said cause, to wit:

#190.

GEORGE E. TINKER, Plaintiff in Error,
vs.
MIDLAND VALLEY MERCANTILE COMPANY, Defendant in Error.

Ordered by the Court, that defendant in error in the above cause be allowed 10 days to file briefs.

46 And afterwards, at the September, 1909, Term of said court, on the second day of November, 1909, the following proceeding was had in said cause, to wit:

#190.

GEORGE E. TINKER, Plaintiff in Error,
vs.
MIDLAND VALLEY MERCANTILE COMPANY, Defendant in Error.

Ordered by the Court, that the motion to advance the above cause, be, and the same is hereby overruled.

47 And afterward, at the November, 1909 Term of said Supreme Court, on the 9th day of November, 1909, the following proceeding was had in said cause, to wit:

#190.

GEORGE E. TINKER, Plaintiff in Error,
vs.
MIDLAND VALLEY MERCANTILE COMPANY, Defendant in Error.

And now this cause comes on for final decision and determination by the court upon the record and briefs filed herein.

And the Court having duly considered the same, and being fully advised in the premises, finds, that the judgment of the trial court in the above cause should be affirmed.

It is therefore ordered and adjudged by the court that the judgment of the trial court in the above cause, be, and the same is hereby affirmed.

Opinion by Hayes, J. All the Justices concur.

48 In the Supreme Court of the State of Oklahoma.

No. 190.

GEORGE E. TINKER, Plaintiff in Error,
v.
MIDLAND VALLEY MERCANTILE COMPANY, Defendant in Error.

(*Syllabus by the Court.*)

Where the maker of a promissory note seeks to avoid the same upon the ground that it was executed without consideration, or for a consideration that was void under a statute, the burden of proof is upon him to show that the note was without consideration or that it was given for a consideration prohibited by the statute.

Error from District Court of Pawnee County, Territory of Oklahoma.

L. M. Poe, Trial Judge.

Boone, Palmer & McDonald, Attorneys for Plaintiff in Error.
C. R. Buckner, Attorney for Defendant in Error.

Affirmed.

Opinion of the court by HAYES, *J.*:

This is an action on a promissory — for the sum of $922.50 executed by plaintiff in error, defendant below, to defendant in error, plaintiff below, on September 1st, 1906. Plaintiff's petition contains the averments necessary to state a cause of action on a promissory note. Defendant by his answer admits the execution and
49 delivery of the note, but for his defense to the action, he alleges that at the time he executed the note, plaintiff was licensed by the United States Government to trade with the Indians within the Osage Indian Reservation; that defendant is an Osage Indian, and that plaintiff, as such licensed trader, had, from time to time, extended credit to him as an individual and as head of a family, for goods, wares and merchandise largely in excess of seventy-five per cent of the next quarterly annuity due after extending such credit to defendant; that said note was given as evidence of such excess indebtedness, and therefore the consideration of the note was illegal and the note void. After defendant, who assumed the burden of proof, had introduced his evidence, the court sustained a demurrer thereto and rendered judgment in favor of the plaintiff for the amount of the note, including interest and attorney's fees. This action of the court is the only error urged for reversal of the case.

We have carefully examined the evidence and think the court committed no error. By the Indian Appropriation Act of March 3d, 1901, it was provided:

"That it shall be unlawful hereafter for the traders upon the Osage Indian Reservation to give credit to any individual Indian or head of a family to an amount greater than sixty per centum of the next quarterly annuity to which such individual Indian or head of a family will be entitled; and if such trader shall give credit to any individual Indian or head of a family upon such reservation in excess of the amount herein allowed, no portion of the indebtedness thus created shall be collectible, and the same shall be void and the license of such trader shall be revoked".

(31 Stat. L. 1065).

Defendant attempts to charge in his answer that plaintiff, from time to time, in violation of the above statute, extended credit to defendant in excess of the amount permitted by the statute, and that the note in controversy was given in settlement of such indebtedness. He does not charge that the indebtedness was made or contracted at the time the note was given. Defendant testified that the amount he received for himself and family on September 4th, 1906, which was the first annuity after the execution of the
50 note, was $280.00, but there is no evidence whatever tending to prove the essential allegations of the answer, except that plaintiff was a licensed Indian Trader upon the Osage Indian Reservation. There is no evidence whatever that the note was given in payment of excess credits granted by plaintiff from time to time. It is not charged that the note was given in payment for goods purchased since the last quarterly annuity before the execution of the note or in settlement of credits extended during that time and there is no evidence to that effect. It is true that the amount of the note is greater than the annuity received by defendant on September 4th, 1906, just after the execution of the note, but there is nothing in the evidence to show that the debt which the note represented was created at that time and the allegations of the answer are that it was not; nor was there anything in the evidence to show that the debt or any part thereof which the note represented, when created, was in excess of the amount of the following annuity which the maker of the note received.

In an action brought by the payee upon a promissory note where the defendant admits the execution and delivery of the note, in order to defeat it, the burden of proof is upon him to establish that the note was without consideration or that its consideration was illegal. Pixley v. Boynton, 79 Ill. 351; Stanton v. Strong, 94 Ill. App. 486; Sollenberg v. Stephens, 46 Kan. 386; Cundiff v. Campbell, 40 Tex. 142.

The judgment of the trial court is affirmed.

Kane, C. J. Williams, Dunn, Turner, JJ. concur.

51 In the Supreme Court of the State of Oklahoma.

No. 190.

GEORGE E. TINKER, Plaintiff in Error,
vs.
MIDLAND VALLEY MERCANTILE COMPANY, Defendant in Error.

Application for Re-hearing.

Comes now the plaintiff in error, and makes application to the court to grant him a re-hearing in the above entitled cause, for the reason that the court in determining said cause has overlooked questions of fact presented by the evidence in said cause, which are decisive of this controversy. The evidence discloses on page 16 of the record that the defendant in error was licensed as a trader with the Osage Indians upon the Osage Indian Reservation during the year 1906, and that their license extended from April 3, 1906, to April 3, 1907.

The evidence further discloses on pages 14 and 15 that the plaintiff in error, who is a member of the Osage Tribe of Indians, was entitled to a quarterly annuity at the rate of $46.00 per head, and that there were seven (7) members of the family, which would make not to exceed Three Hundred Twenty-two ($322.00) Dollars per quarter, which the plaintiff in error was entitled to, or Six Hundred Forty-four ($644.00) Dollars, for the two quarters prior to September, 1906, and the note sued upon shows an extension of credit to this particular member of the Osage Indian Tribe, in the sum of Nine Hundred Twenty-two ($922.00) Dollars, which is conclusive in itself that the defendant in error, a licensed Indian Trader extended credit during the two quarters which it was entitled to trade with the Indians, not only an amount greater than sixty per cent. of the next quarterly annuity, but for an amount greater than the entire annuity for two quarters, and we respectfully
52 submit that the court overlooked this phase of the proposition in rendering its opinion, which brings this cause squarely within the provision of the Indian Appropriation Act of March 3, 1901, referred to in the opinion filed in this cause.

BOONE, LEAHY & McDONALD,
Attorneys for Plaintiff in Error.

Filed Nov. 23, 1909. W. H. L. Campbell, Clerk.

53 And thereafter, at the November, 1909, Term of said Supreme Court, on the 30th day of November, 1909 the following proceeding was had in said cause, to wit:

#190.

GEORGE E. TINKER, Plaintiff in Error,
vs.
MIDLAND VALLEY MERCANTILE COMPANY, Defendant in Error.

Ordered by the Court, that the petition for rehearing in the above cause be, and the same is hereby denied.

54 In the Supreme Court of the State of Oklahoma.

Certificate.

I, W. H. L. Campbell, Clerk of the Supreme Court of the State of Oklahoma, do hereby certify that the foregoing 53 pages, numbered from 1 to 53, both inclusive, are a full, true and complete transcript of the record and all proceedings in the cause of George E. Tinker, Plaintiff in error, vs. Midland Valley Mercantile Company, Defendant in error, No. 190, as the same remains on file and of record in my office.

In witness whereof, I hereto set my hand and affix the seal of said court, at Guthrie, Oklahoma, this 21st day of June, 1910.

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL,
Clerk Supreme Court of Oklahoma,
By W. M. BONNER, *Deputy.*

Endorsed on cover: File No. 22,257. Oklahoma Supreme Court. Term No. 102. George E. Tinker, plaintiff in error, vs. Midland Valley Mercantile Company. Filed July 12th, 1910. File No. 22,257.

/3

Supreme Court U. S.
FILED
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Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1913.

No. 13.

GEORGE E. TINKER, PLAINTIFF IN ERROR,

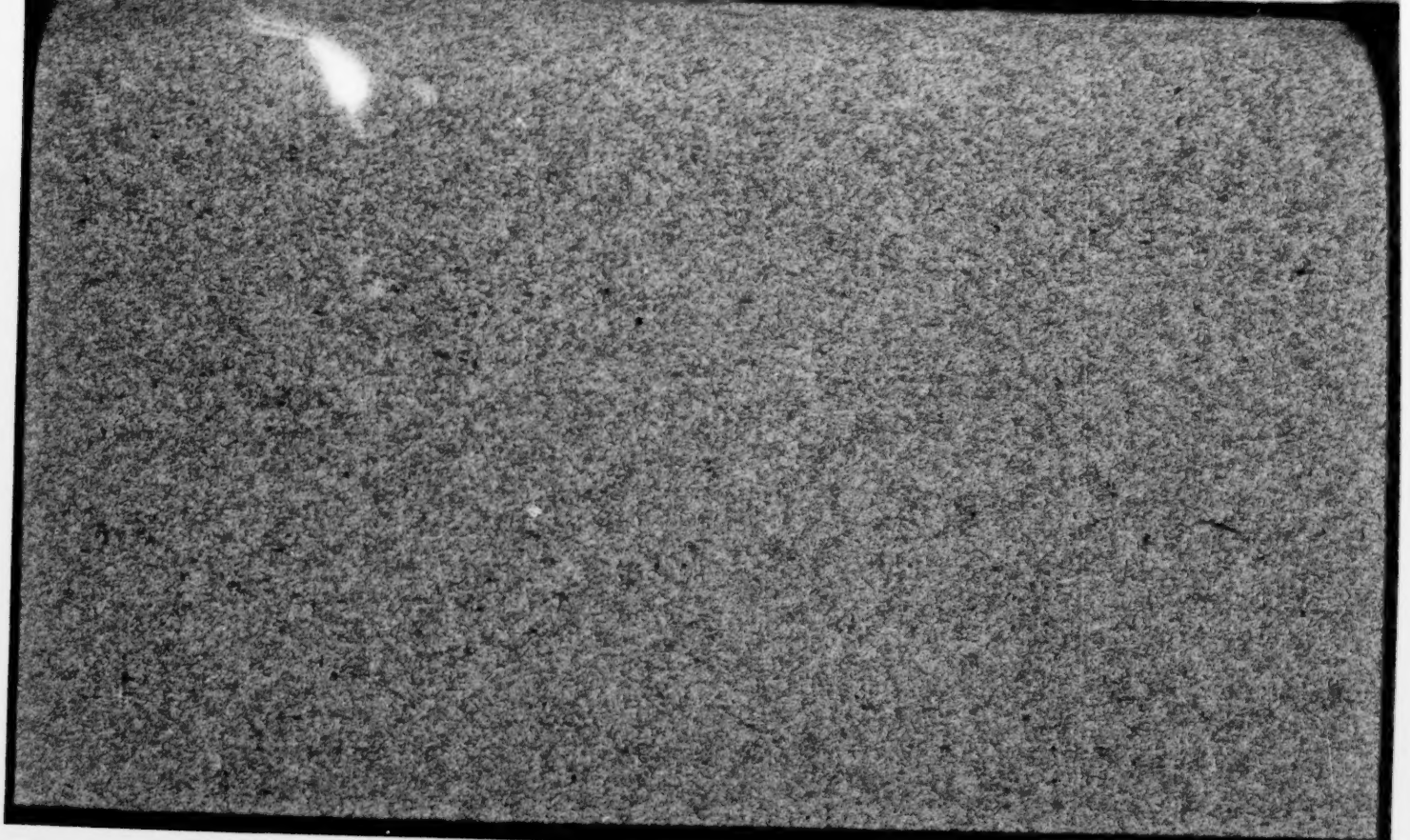
VS.

MIDLAND VALLEY MERCANTILE COMPANY.

BRIEF FOR PLAINTIFF IN ERROR.

CHAS. H. MERILLAT,
Attorney for Plaintiff in Error.

J. B. MILAM & SONS, LAW PRINTERS, 507 8TH ST. N. W., WASH. D. C.



IN THE

Supreme Court of the United States.

OCTOBER TERM, 1913.

No. 13.

GEORGE E. TINKER, PLAINTIFF IN ERROR,

VS.

MIDLAND VALLEY MERCANTILE COMPANY.

BRIEF FOR PLAINTIFF IN ERROR.

This cause comes before the court on writ of error from the Supreme Court of the State of Oklahoma which affirmed (Trans. Rec., 23) a judgment rendered February 27, 1908, by the District Court of Osage County of the State of Oklahoma (Rec., 16) against Tinker, the plaintiff in error, in the sum of $1,065.85 upon a promissory note made by Tinker (Rec., 7) payable to the defendant in error in the sum of $922.50, the note bearing date Pawhuska, September 1, 1906, and being payable October 1, 1906. The judgment also bore (Rec., 16) the further sum of $102.25 as attorney's fees upon the note for non-payment thereof.

Statement of the Case.

The record in the case shows that George E. Tinker, the plaintiff in error at the time of the trial, and in September, 1906, was a member of the Osage tribe of Indians and had a family consisting in all, including himself, of seven persons. He admitted by his pleading to the suit filed against him upon the promissory note that he had executed the note, but pleaded (Rec., 8) that the note and the consideration thereof was illegal in that the payee of the note and the plaintiff in the action against him was a licensed trader with the Indians in the Osage Indian country, that he, Tinker, was an Osage Indian and that "the plaintiff as such licensed trader had from time to time extended credit to defendant as an individual and as head of the family for goods, wares and merchandise largely in excess of seventy-five per cent of the next quarterly annuity due after extending such credit to defendant, and said note was given as evidence of such excess indebtedness." It averred that plaintiff claimed that defendant was indebted to it in the sum sued for over and above seventy-five per cent of said annuities which had theretofore accrued and which was next thereafter to accrue.

Tinker as witness, testified that the next quarterly payment made after September 1, 1906, the date of the note, was a payment of $46.00 per head made September 4, 1906, the total payment to him as head of the family being about $280.00.

H. C. Ripley, the trade supervisor for the Osage tribe of Indians, testified (Rec., 11) that the Midland Valley Mercantile Company had a license to deal with the Osage Indians granted April 3, 1906, which expired April 3, 1907.

Upon the foregoing record the trial court gave judgment against Tinker and upon that judgment, on a case made, being affirmed by the Supreme Court of Oklahoma a writ of error was sued out (Rec., 3) to this court.

The ground of the writ of error is that the note was void under statutes of the United States relating to the Osage tribe of Indians and that there was drawn in question (Rec., 4) "the validity of a treaty or statute of, or an authority exercised under, the United States and the decision was against their validity" and that "the decision was against the title, right, privilege or exemption specially set up or claimed under such clause of the said constitution, treaty, statute or commission."

Assignment of Errors.

1. That the court below and the trial court on the whole record erred in not giving judgment in favor of the plaintiff in error (defendant below).

2. That the court below erred in affirming the judgment of the trial court in entering judgment in favor of the defendant in error (plaintiff below).

3. That the court erred in not holding that the note sued upon was void under the statutes of the United States in such cases made and provided and not collectible under such statutes.

4. That the court erred in holding that there was not a presumption on the whole record that the note sued upon was given in payment of an indebtedness accruing during the quarter preceding the quarterly payment of September 4, 1906.

5. That the court erred in holding that the burden of proof was upon the plaintiff in error (defendant below)

to prove, notwithstanding the note largely exceeded the September 4, 1906, annuity payment, that it represented excess and illegal credits granted by the defendant in error to the plaintiff in error and in not holding that the burden of proof was upon the defendant in error (plaintiff below) to show that the note represented lawful credits upon it being shown the note had been executed Sept. 1, 1906.

Argument.

By the Constitution of the United States plenary power over commerce with the Indians in the several states is vested in the United States. By the Enabling Act admitting Oklahoma to Statehood it was expressly provided that the authority of the United States over the Indians within the borders of the State should continue unimpaired, notwithstanding the grant of statehood.

By the provisions of the Revised Statutes of the United States no person can treat with an Indian without first obtaining a trader's license. At the time the note was given the Osage Reservation was still unallotted and the Osage Indians held their land in common and they lived upon a typical Indian Reservation, allotment in severalty not yet having been effected.

The applicable provisions of the Revised Statutes of the United States are as follows:

Sec. 2129. No person shall be permitted to trade with any of the Indians in the Indian country without a license therefor from a Superintendent of Indian affairs, or Indian agent, or sub-agent, which license shall be issued for a term not exceeding two years for the tribes east of the Mississippi, and not exceeding three years for the tribes west of that river.

Sec. 2131. The superintendent of the district shall have power to revoke and cancel any license to trade within the Indian country whenever the person has, in his opinion, transgressed any of the laws or regulations provided for the government of trade and intercourse with the Indian tribes, or whenever in his opinion, it is improper to permit such person to remain in the Indian country. No trade with the tribes shall be carried on within their boundary, except at certain suitable and convenient places, to be designated from time to time by the superintendents, agents, and sub-agents, and to be inserted in the license. The persons granting or revoking such licenses shall forthwith report the same to the Commissioner of Indian Affairs, for his approval or disapproval.

Sec. 2133. Any person other than an Indian who shall attempt to reside in the Indian country as a trader, or to introduce goods, or to trade therein without such license, shall forfeit all merchandise offered for sale to the Indians, or found in his possession, and shall moreover be liable to a penalty of five hundred dollars.

With respect to trading on the Osage Indian Reservation there was special congressional legislation resulting from the many difficulties that had been occasioned with Indian traders by reason of the comparative wealth of the Osage Indians, and dealings with the Indians were under the supervision of an official of the Indian service known as the Trade Supervisor, Mr. H. C. Ripley. (Rec., 11.)

By the act making appropriation for the Indian service approved March 3, 1901 (31 Stats., 1058-65) Congress provided for an examination and adjustment of outstanding accounts between the Indian traders and the

Osage Indians which had long been in dispute, and then, as to future accounts, enacted:

"And provided further, that it shall be unlawful hereafter for the traders upon the Osage Indian reservation to give credit to any individual Indian or head of a family to an amount greater than sixty per centum of the next quarterly annuity to which such individual Indian or head of a family will be entitled; if such traders shall give credit to any individual Indian or head of a family upon such reservation in excess of the amount herein allowed no portion of the indebtedness thus created shall be collectible, and the same shall be void and the licenses of such traders shall be revoked."

This act was amended by the Indian Appropriation Act, approved June 1, 1906 (34 Stats., 325-366), to read as follows: "That it shall be unlawful hereafter for the traders upon the Osage Indian Reservation to give credit to any individual Indian, head of a family, to an amount greater than seventy-five per centum of the next quarterly annuity to which such Indian will be entitled."

That it was competent for Congress to pass the foregoing legislation is not longer open to question. In Roff vs. Burney, 168 U. S., 218-22, it was held, citing a number of prior opinions:

> "The Indians and the territory which may have been specially set apart for their use are subject to the jurisdiction of the United States, and Congress may pass such laws as it sees fit prescribing the rules governing the intercourse of the Indians with one another and with citizens of the United States."
>
> See also Lone Wolf vs. Hitchcock, 187 U. S., 553.

Congress, in the exercise of its power and duty to protect this dependent people from their own improvidence, imposed limitations upon their capacity to contract, and upon those contracting with them, specifically prohibited the Indian traders who were in the Osage reservation and dealing with the Osage Indians by its license and had, save for that license, no trading rights whatsoever, from "giving credit" to an Osage Indian in excess of seventy-five per cent of the forthcoming quarterly payment to the Indian and in express terms declared void and non-collectible any "indebtedness" created in violation of the act. The note sued on was given just prior to a payment and is several times in excess in amount of that payment.

The legislation in question has its counterpart in statutes, common in many States, for the protection of married women by declaring void their contracts as accommodation makers, endorsers or guarantors. Such statutes it has been repeatedly held, should be liberally construed and enforced in accordance with the spirit of protection and the public policy underlying them.

Waters vs. Pearson, 39 App. D. C., 10.

With reference to Indians the rule of this court is that the principle of enlarged construction shall be applied to Indians and statutes construed and enforced so as to afford them the protection due a dependent people.

Choate vs. Trapp, 224 U. S., 665-75.
United States vs. Winans, 198 U. S., 371.

When therefore it appeared that the maker was an Osage Indian, that the payee was a licensed Osage Indian trader, that the note sued on was given Sept. 1, 1906, and largely exceeded in amount the next quarterly annuity due and paid Sept. 4, 1906, to the Indian, it is respect-

fully submitted that the invalidity of the note was made at once to appear and that judgment should have been given in favor of plaintiff in error and the underlying policy of Congress enforced. The trader had merely a qualified right of dealing with the Indians and the borders of proof was upon him to bring himself and his note sued upon within his qualified right. When it appeared that the note was given or alleged to be given to a trader and exceeded the prima facie contractual or trading rights of the parties thereto, it was incumbent upon the mercantile company if it would still contend the note was valid to show the facts which would establish such validity. In the instant case the proof showed the trader's license had begun only April 3, 1906, and if it would contend that it had extended credits from time to time to plaintiff in error and that since its license rights began, there had been an annuity payment of which the credits shown by the note sued on did not exceed 75 per cent of such payment it was incumbent upon the defendant in error to show that fact.

It is submitted that the case is controlled by the principle laid down in United States vs. Denver & R. G. R. R. Co., 191 U. S., 85; United States vs. Cook, 19 Wall., 591, and Northern Pacific R. Co. vs. Lewis, 162 U. S., 366, in all of which cases the controversy turned on the question upon whom rested the burden of proof where there was only a qualified, limited or special right of contract or dealing with government or Indian lands, and in all of which it was held that upon it being shown the property was of the character upon which there were conditions, limitations or restrictions, the burden of proof was upon the party claiming the right to prove such right by facts adduced in evidence.

In United States vs. Cook, *supra*, timber had been severed from Indian lands and sold, the law prohibiting this except where the cutting would better adapt the land to occupation. The court said:

> "The Indians having only a right of occupancy in the lands, the presumption is against their authority to cut and sell the timber. Every purchaser from them is charged with notice of this presumption. To maintain his title under his purchase it is incumbent on the purchaser to show that the timber was rightfully severed from the land."

The case is not one as erroneously held below such as where a note given for a gambling debt or other illegal consideration, but one where the evidence showed the party to be under a legal disability to contract; wherefor it is submitted the burden of proof was upon the payee to show by evidence, facts and circumstances that removed the maker and his note from this legal disability, and that would bring the note in question within some exception to what upon the face of the transaction made out a prima facie case of non-liability The knowledge of when, in what amounts and for what credits has been given and goods sold to plaintiff in error or members of his family was peculiarly within the knowledge and open to proof of the mercantile company and if, when want of capacity to give a note of the size in question was made to appear, it was claimed there was in fact capacity to be given the credits evidenced by the note, the burden was on defendant in error to show it.

The Oklahoma Supreme Court, it is submitted, erred in holding the case governed by the rule of law where the defense is that the note was founded upon an illegal

consideration, in which cases the authorities are that the burden of proving the consideration was illegal, rests on the party making such defense. The defense instead being want of capacity to make the note, and the note being shown to be made by an Indian and to exceed his next quarterly annuity, the case was analogous to one where the defendant not being a banking corporation the acceptance of a bill was not within the apparent authority with which the agent was invested, in which case it is for the payee to prove that the acceptance was authorized by the charter, by laws or resolutions of the corporation.

Mather vs. Union L. & T. Co., 7 N. Y. Supp., 213.

Olcott vs. Tioga R. Co., 27 N. Y., 546.

This court has jurisdiction because in the courts below the federal statutes and the federal exemption were specifically pleaded, and the question arising under them distinctly and directly brought forward. Evidence was permitted to be and was given competent to raise the right under the federal statute, and the fact that the decision of the state courts was adverse to the plaintiff in error on the effect of the evidence does not prevent the rights of the plaintiff in error under the applicable statutes and the evidence adduced being fully considered in this court on the merits.

Dower vs. Richards, 151 U. S., 658.
Mackay vs. Dillon, 4 How., 421.

Respectfully Submitted,

CHAS. H. MERILLAT,
Attorney for Plaintiff in Error.

TINKER *v.* MIDLAND VALLEY MERCANTILE COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 13. Submitted October 30, 1913.—Decided January 5, 1914.

Under the provision in the Indian Appropriation Act of June 21, 1906, c. 3504, 34 Stat. 325, 366, making it unlawful for traders on the Osage Indian Reservation to give credit to any individual Indian head of a family for any amount exceeding seventy-five per centum of his next quarterly annuity, the burden of proof is on the person taking and attempting to enforce a note to bring his claim within the permission of the statute.

The order of pleading does not always determine the burden of proof.

While generally the payee of a note need not allege consideration in declaring upon it, if there is conflicting evidence he has the burden of proof.

Quære, whether the fact that a note is very largely in excess of the amount permitted to be given by statute does not constitute a *prima facie* case against the holder even if the burden were not upon him.

25 Oklahoma, 160, reversed.

THE facts, which involve the construction and application of the act of June 21, 1906, making it unlawful for traders on the Osage Reservation to give credit beyond a certain amount to Indians, are stated in the opinion.

Mr. Charles H. Merillat for plaintiff in error.

No appearance for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action on a promissory note for $922.50 dated September 1, 1906, against an Osage Indian residing on

the Osage Reservation. By the Indian Appropriation Act of June 21, 1906, c. 3504, 34 Stat. 325, 366, it was made "unlawful hereafter for the traders upon the Osage Indian Reservation to give credit to any individual Indian, head of a family, to an amount greater than seventy-five per centum of the next quarterly annuity to which such Indian will be entitled." This amended the previous act of March 3, 1901, c. 832, 31 Stat. 1058, 1065, by which the limit was sixty per centum. The defendant demurred and the demurrer having been overruled answered that the note was given for a debt in excess of seventy-five per cent. of the next quarterly annuity due to him after the credit was extended and that the note exceeded that amount. It appeared in evidence that the plaintiff, the defendant in error, was a licensed trader with the Indians and the defendant testified that he received as his quarterly payment forty-six dollars for each of the seven members of his family, which would be $322—in any event much less than $922.50. It was not shown when the credits were given. The plaintiff demurred to the evidence and the demurrer was sustained by both courts below. 25 Oklahoma, 160.

The Supreme Court of the State put its decision on the burden of proof, following the analogy of illegal consideration. We hardly need consider whether proof that the note was so largely in excess of the percentage then allowable, especially when coupled with the improbability that the defendant ever had received in the past an annuity so much larger as to warrant such a credit, did not constitute at least a *prima facie* case. The court is of opinion that, in view of the policy of the statute, the relative position of the parties and the protection necessarily extended to Indians, the burden was on the plaintiff not only to bring his claim within the permission of the statute in fact, as he was warned by its letter that he must, but also to prove that he had done so, in case of dispute. He occu-

pied the position of advantage and that rather than formal logic determines the burden of proof. It may be that it lay on the defendant to plead the defense. That is a question of convenience. *Burnet* v. *Desmornes*, 226 U. S. 145, 147. But the order of pleading does not always determine the burden of proof. Generally it is not considered necessary for the payee of a promissory note to allege a consideration in declaring upon it, but if there is conflicting evidence he has the burden of proof. *Delano* v. *Bartlett*, 6 Cush. 364; *Burnham* v. *Allen*, 1 Gray, 496.

Judgment reversed.

12

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [illegible]. 1911

No. [illegible]108

WILLIAM P. TRIMBLE AND CANNIE F. TRIMBLE,
PLAINTIFFS IN ERROR,

vs.

THE CITY OF SEATTLE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

FILED OCTOBER 7, 1911.

(22,893.)



(22,893.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 817.

WILLIAM P. TRIMBLE AND CANNIE F. TRIMBLE,
PLAINTIFFS IN ERROR,

vs.

THE CITY OF SEATTLE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

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No. 74817.

WILLIAM P. TRIMBLE and CANNIE F. TRIMBLE, His Wife,
Plaintiffs-Appellants,
vs.
THE CITY OF SEATTLE, Defendant-Respondent.

Transcript on Appeal from the Superior Court of the State of Washington in and for the County of King to the Supreme Court of the State of Washington.

Filed Feb. 2, 1911.
D. K. SICKELS, *Clerk.*

Filed Apr. 17, 1911.
C. S. REINHART, *Clerk.*

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3 *Transcript of Record of the City of Seattle Relating to the Improvement of Sixth Avenue South, under Ordinance No. 15463, Local Improvement Dist. 1417.*

(1) Council Proceedings	Pages	1 to 24	inc.
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(11) File #40856; Notice of Appeal of Wm. P. Trimble & wife to Superior Court.. " 53 to 56 "
(12) Certificate of City Comptroller & ex-officio City Clerk that the within and foregoing are true and correct copies.. .....

4 Vol. 16, folio 217.

Adjourned Session.

Be it remembered, that the city council of the City of Seattle met at the council chamber in the City hall in the City of Seattle, on this the 31st day of December, 1906, at the hour of 8.00 o'clock P. M., pursuant to adjournment.

President Bowen in the chair.

At roll call the following members were—

Present: Burnett, Conway, Crichton, Gill, Hurd, Keene, Kelso, Morrison, Mullen, Murphy, Revelle, Reynolds, Sawyer, Mr. President. 14.

Absent: Zbinden, 1, who comes in later.

Whereupon the following proceedings were had:

Folio 227, folio 228.

Introduction of Resolutions.

By CONWAY:

Res. No. 443, declaring it to be the intention of the city council to order the improvement of Sixth Avenue South, from Seattle Boulevard at Charles Street to Charlestown Street, and other connecting streets and avenues, by constructing a plank roadway therein, and setting February 4, 1907, at 8.00 o'clock P. M. for hearing thereon.

Adopted by the following vote:

In favor: Burnett, Conway, Crichton, Gill, Hurd, Keene, Kelso, Morrison, Mullen, Murphy, Revelle, Reynolds, Sawyer, Zbinden, Mr. President. 15.

Against: None.

There being no objections the President signed the resolution.

5 Folio 240.

Thereupon the council adjourned until January 7, 1907, at 8.00 o'clock P. M.

Approved:

D. W. BOWEN,
President of the City Council.

Attest:

H. W. CARROLL,
City Comptroller and ex-Officio City Clerk.

Vol. 16, folio 307.

Charter Session.

Be it remembered that the City Council of the City of Seattle met at the Council Chamber at the City Hall, in the City of Seattle, on this the 4th day of February, 1907, at the hour of 8.00 o'clock P. M., pursuant to the provisions of the city charter, and pursuant to adjournment heretofore had.

President Bowen in the chair.

At roll call the following members were—

Present: Burnett, Conway, Crichton, Gill, Hurd, Keene, Kelso, Morrison, Mullen, Murphy, Revelle, Reynolds, Sawyer, Zbinden, Mr. President. 15.

Absent: None.

Whereupon the following proceedings were had:

Folio 308.

Special Order.

Pursuant to Resolution No. 443, adopted December 31, 1906, and notice given thereunder, the council did then proceed to consider the matter of ordering the improvement of Sixth avenue south, from Seattle Boulevard at Charles Street to Charlestown street and other streets and avenues. The clerk laid before the council the affidavit of the publisher of the Seattle Daily Bulletin, the city official newspaper, that said resolution had been published in said paper
6 for the period of five days, commencing January 3, 1907, and ending January 8, 1907. No protests were presented. The board of public works having failed to make report thereon, upon motion it was ordered that the further consideration of said matter be postponed until February 11, 1907, at 8.00 o'clock P. M.

Folio 317, folio 318.

Introduction of Bills.

By CONWAY:

C. B. No. 2097, providing for the improvement of Sixth avenue South, from Seattle Boulevard at Charles Street to Charlestown Street, and other connecting streets and avenues by constructing a plank roadway, in accordance with resolution No. 443.

Read first time and referred to Street Committee.

Folio 323.

Thereupon the council adjourned until February 7, 1907, at 8.00 o'clock P. M.

Approved:

D. W. BOWEN,
President of the City Council.

Attest:

H. W. CARROLL,
City Comptroller and ex-Officio City Clerk.

Vol. 16, folio 326.

Adjourned Session.

Be it remembered that the city council of the City of Seattle met at the council chamber in the city hall in the city of Seattle, on this the 11th day of February, 1907, at the hour of 8.00 o'clock P. M., pursuant to adjournment.

President Bowen in the chair.

At roll call the following members were—

7 Present: Burnett, Conway, Crichton, Gill, Hurd, Keene, Morrison, Mullen, Murphy, Revelle, Reynolds, Sawyer, Zbinden, Mr. President. 14.

Absent: Kelso. 1.

Whereupon the following proceedings were had:

Folio 329.

Special Order.

Pursuant to postponement from February 4, 1907, the council did then proceed to consider the matter of ordering the improvement of Sixth avenue south, from Seattle Boulevard at Charlestown street, by constructing a plank roadway therein, in accordance with Resolution No. 443. The clerk laid before the council the report of the board of public works thereon, describing the property to be specially benefited thereby, estimating the total cost thereof at $86,000, and stating that said sum, to be assessed against abutting property, at 25% does not exceed the limit of assessment prescribed by the city charter. No protests were presented. Upon motion it was ordered that said matter be referred to the street committee, and that the further consideration thereof be postponed until February 18, 1907, at 8.00 o'clock P. M.

Folio 343.

Thereupon Councilman Gill moved that the council do now adjourn. Motion seconded. The yeas and nays being demanded, upon call of the roll said motion is carried by the following vote:

In favor: Conway, Gill, Hurd, Keene, Morrison, Mullen, Sawyer, Zbinden. 8.

Against: Burnett, Crichton, Murphy, Revelle, Reynolds, Mr. President.

8 Approved:

D. W. BOWEN,
President of the City Council.

Attest:

H. W. CARROLL,
City Comptroller and ex-Officio City Clerk.

Vol. 16, folio 344.

Charter Session.

Be it remembered, that the city council of the city of Seattle met in the council chamber in the city hall of the city of Seattle, Washington, on this the 18th day of February, 1907, at the hour of 8.00 o'clock P. M., pursuant to the provisions of the city charter and pursuant to adjournment heretofore had.

President Bowen in the chair.

At roll call the following members were—

Present: Burnett, Conway, Crichton, Gill, Hurd, Keene, Morrison, Mullen, Murphy, Revelle, Reynolds, Sawyer, Zbinden, Mr. President. 14.

Absent: Kelso. 1.

Whereupon the following proceedings were had:

Folio 348.

Special Order.

Pursuant to postponement from February 11, 1907, the council did then proceed to consider the matter of ordering the improvement of Sixth Avenue South from Seattle Boulevard at Charles street to Charlestown Street, and other connecting streets and avenues, by constructing a plank roadway in accordance with Resolution No. 443. No protests were presented. The Street Committee, to which said matter had been referred, reported orally thereon, recommending that said improvement be ordered. Report adopted. Upon notice said improvement was ordered.

9 Folio 352.

Reports of Committees.

From Street Committee:

C. B. No. 2097, providing for the improvement of Sixth Avenue South, from Seattle Boulevard at Charles Street to Charlestown Street, and other streets, by constructing a plank roadway, in accordance with Resolution No. 443, recommending that same do pass. Report adopted.

Folio 358.

Second and Third Reading.

C. B. No. 2097, providing for the improvement of Sixth avenue south, from Seattle Boulevard at Charles Street to Charlestown street, and other connecting streets and avenues, by constructing therein a plank roadway, in accordance with Resolution No. 443.

Read second and third times and passed by the following vote:
In favor: Burnett, Conway, Crichton, Gill, Hurd, Keene, Morrison, Mullen, Murphy, Revelle, Reynolds, Sawyer, Zbinden, Mr. President. 14.
Against: None.
There being no objections the president signed the bill.
(C. B. No. 2097 became Ordinance No. 15463.)

Folio 368.

Thereupon the council adjourned until February 25, 1907, at 8.00 o'clock P. M.
Approved:

D. W. BOWEN,
President of the City Council.

Attest:
H. W. CARROLL,
City Comptroller and ex-Officio City Clerk.

10 Vol. 16, folio 369.

Adjourned Session.

Be it remembered that the city council of the city of Seattle met in the council chamber in the city hall of the city of Seattle this the 25th day of February, 1907, at the hour of 8.00 o'clock P. M., pursuant to adjournment.
President Bowen in the chair.
At roll call the following members were—
Present: Burnett, Conway, Crichton, Gill, Hurd, Keene, Kelso, Morrison, Mullen, Revelle, Reynolds, Zbinden, Mr. President. 13.
Absent: Murphy, Sawyer. 2. Murphy coming in later.
Whereupon the following proceedings were had:

Folio 378.

Introduction of Bills.

By Judiciary Committee:

C. B. No. 2256, providing for the improvement of Sixth Avenue South, by constructing a plank roadway in accordance with Resolution No. 443.
Read first time.

Folio 383.

Thereupon the council adjourned until March 4, 1907, at 8.00 o'clock P. M.
Approved:

D. W. BOWEN,
President of the City Council.

Attest:
H. W. CARROLL,
City Comptroller and ex-Officio City Clerk.

Vol. 16, folio 384.

Charter Session.

Be it remembered that the city council of the city of Seattle met in the council chamber in the city hall in the city of Seattle, on this the 4th day of March, 1907, at the hour of 8.00 o'clock P. M., pursuant to the provisions of the city charter and pursuant to adjournment heretofore had.

President Bowen in the chair.

At roll call the following members were—

Present: Burnett, Crichton, Gill, Hurd, Keene, Kelso, Morrison, Mullen, Murphy, Revelle, Reynolds, Sawyer, Zbinden, Mr. President. 14.

Absent: Conway. 1. Conway, coming in later.

Whereupon the following proceedings were had:

Folio 397, folio 401.

Second and Third Reading.

C. B. No. 2226, providing for the improvement of Sixth Avenue South in accordance with Res. No. 443. Read second time and upon motion indefinitely postponed.

Thereupon the council adjourned until March 11, 1907, at 8.00 o'clock P. M.

Approved:

D. W. BOWEN,
President of the City Council.

Attest:

H. W. CARROLL,
City Comptroller and ex-Officio City Clerk.

Vol. 16, folio 600.

Adjourned Session.

Be it remembered that the city council of the city of Seattle met in the council chamber in the city hall, in the city of Seattle, Washington, on this the 27th day of May, 1907, at the hour of 8 o'clock P. M., pursuant to adjournment.

Present: Bowen, Conway, Crichton, Gill, Hurd, Keene, Kelso, Mullen, Murphy, Revelle, Reynolds, Sawyer, Zbinden, Mr. President.

President Burnett in the chair.

Whereupon the following proceedings were had:

12 Folio 602.

Communications and Reports from City Officials.

Requests of city engineer for an extension of time for 30 days in which to prepare assessment rolls L. I. D. No. 1417 and 1455 upon motion is granted.

Folio 613.

Thereupon the council adjourned until June 3, 1907, at 8.00 o'clock P. M.

Approved:

C. H. BURNETT, JR.,
President of the City Council.

Attest:

H. W. CARROLL,
City Comptroller and ex-Officio City Clerk.

Vol. 16, folio 614.

Charter Session.

Be it remembered that the city council of the city of Seattle met in the council chamber in the city hall in the city of Seattle, on this the 3rd day of June, 1907, at the hour of 8.00 o'clock P. M., pursuant to the provisions of the city charter, and pursuant to adjournment heretofore had.

President Burnett in the chair.

At roll call the following members were—

Present: Bowen, Conway, Crichton, Gill, Hurd, Keene, Kelso, Morrison, Mullen, Murphy, Revelle, Reynolds, Sawyer, Zbinden, Mr. President. 15.

Absent: None.

Whereupon the following proceedings were had:

Folio 621.

Introduction of Resolutions.

By Judicary Committee:

Res. No. 717, providing for notice of assessment roll L. I.
13 D. No. 1417, for the improvement of Sixth avenue south, and other streets and avenues, under ordinance No. 15463, and setting July 8, 1907, at 8.00 o'clock P. M. for hearing thereon.

Adopted by the following vote:

In favor: Bowen, Conway, Crichton, Gill, Hurd, Keene, Kelso, Morrison, Mullen, Murphy, Revelle, Reynolds, Sawyer, Zbinden, 14.

Against: None. Mr. President being without the bar of the council.

There being no objections the president pro tem. signed the resolution.

Folio 636.

Thereupon the council adjourned until June 10 1907, at 8.00 o'clock P. M.

Approved:

C. H. BURNETT, Jr.,
President of the City Council.

Attest:

H. W. CARROLL,
City Comptroller and ex-Officio City Clerk.

Vol 17, folio 83

Adjourned Session.

Be it remembered that the city council of the city of Seattle met in the council chamber at the city hall in the city of Seattle, on this the 8th day of July, 1907, at the hour of 8.00 o'clock P. M. pursuant to adjournment.

Councilman Revelle in the chair pro tem.

At roll call the following members were—

Present: Bowen, Conway, Crichton, Gill, Hurd, Keene, Kelso, Morrison, Mullen, Murphy, Revelle, Reynolds, Sawyer, Zbinden. 14.

Absent: Mr. President. 1.

Whereupon the following proceedings were had:

14 Special Order.

Pursuant to Resolution No. 717, adopted June 3, 1907, and notice given thereunder, the council did then proceed to consider the matter of the approval of assessment roll L. I. D. No. 1117, for the improvement of Sixth avenue south, and other streets and avenues, under ordinance No. 15463. The clerk laid before the council the affidavit of the publisher of the Morning Times and Seattle Daily Bulletin, the city official newspaper, that said notice of assessment roll had been published in said paper for the period of ten days, commencing June 4, 1907, and ending June 14, 1907. No protests were presented. Upon motion it was ordered that the further consideration of said matter be postponed until August 26, 1907, at 8.00 o'clock P. M.

Folio 98.

Thereupon the council adjourned until July 15, 1907, at 8.00 o'clock P. M.

Approved:

THOS. P. REVELLE.
President pro Tem. of the City Council.

Attest:

H. W. CARROLL.
City Comptroller and ex-Officio City Clerk.

Vol 17, folio 200.

Adjourned Session.

Be it remembered that the city council of the city of Seattle met in the council chamber in the city hall in the city of Seattle, Washington, on this the 26th day of August, 1907, at the hour of 8.00 o'clock P. M., pursuant to adjournment.

President Burnett in the chair.

At roll call the following members were—

15 Present: Armstrong, Bowen, Conway, Crichton, Gill, Hines, Hurd, Keene, Kelso, Morrison, Mullen, Murphy, Revelle, Reynolds, Sawyer, Zbinden, Mr. President. 17.

Absent: None.

Whereupon the following proceedings were had:

Folio 209.

Special Order.

Pursuant to postponement from July 8, 1907, the council did then proceed to consider the matter of the approval of assessment roll L. I. D. No. 1417, for the improvement of Sixth Avenue South, and other streets and avenues, under Ordinance No. 15463. The clerk laid before the council the protest of Geo. B. McCulloch and others (#32858) against such assessment. Upon motion it was ordered that said matter, together with said protest, be referred to the street committee, and that the further consideration thereof be postponed until September 3, 1907, at 8.00 o'clock P. M.

Folio 229.

Thereupon the council adjourned until August 29, 1907, at 8.00 o'clock P. M.

Approved:

C. H. BURNETT, Jr.,
President of the City Council.

Attest:

H. W. CARROLL,
City Comptroller and ex-Officio City Clerk.

Vol. 17, folio 231.

Charter Session.

Be it remembered that the city council of the city of Seattle, Washington, met in the council chamber in the city hall of the city of Seattle, Washington, on this the 3rd day of September, 1907, at the hour of 8.00 o'clock P. M., pursuant to the provisions of the city charter and pursuant to adjournment heretofore had.

16 President Burnett in the chair.

At roll call the following members were—

Present: Armstrong, Bowen, Conway, Crichton, Gill, Hines, Hurd, Keene, Kelso, Morrison, Mullen, Murphy, Revelle, Reynolds, Sawyer, Zbinden, Mr. President. 17.

Absent: None.

Whereupon the following proceedings were had:

Folio 235.

Special Order.

Pursuant to postponement from August 26, 1907, the council did then proceed to consider the matter of the approval of assessment roll L. I. D. No. 1417 for the improvement of Sixth avenue south, and other streets and avenues, under Ordinance No. 15463. The street committee, to which said matter had been referred, reported thereon, recommending that said assessment roll be approved. Report adopted. No protests were presented.

Folio 251.

Thereupon the council adjourned until September 9, 1907, at 8.00 o'clock P. M.

Approved:

C. H. BURNETT, Jr.,
President of the City Council.

Attest:

H. W. CARROLL,
City Comptroller and ex-Officio City Clerk.

Vol. 17, folio 252.

Adjourned Session.

Be it remembered that the city council of the city of Seattle, Washington, met in the council chamber in the city hall, in the city of Seattle, on this the 9th day of September, 1907, at
17 the hour of 8.00 o'clock P. M., pursuant to adjournment.

President Burnett in the chair.

At roll call the following members were—

Present: Armstrong, Bowen, Conway, Crichton, Gill, Hines, Keene, Kelso, Morrison, Mullen, Murphy, Revelle, Reynolds, Sawyer Zbinden, Mr. President. 16.

Absent: Hurd. 1.

Whereupon the following proceedings were had:

Folio 261, folio 262.

Introduction of Bills.

By Judiciary Committee:

C. B. No. 3795, approving assessment roll L. I. D. No. 1417, for the improvement of Sixth Avenue south and other streets and avenues, under ordinance No. 15463. Read first time.

Folio 269.

Thereupon the council adjourned until September 16, 1907, at 8.00 o'clock P. M.

Approved:

C. H. BURNETT, Jr.,
President of the City Council.

Attest:

H. W. CARROLL,
City Comptroller and ex-Officio City Clerk.

Vol. 17, folio 270.

Charter Session.

Be it remembered, that the city council of the city of Seattle, Washington, met in the council chamber in the city hall, in the city of Seattle, Washington, on this the 16th day of September, 1907, at the hour of 8.00 o'clock P. M., pursuant to adjournment
18 and pursuant to the provisions of the city charter.

President Burnett in the chair.

At roll call the following members were—

Present: Armstrong, Bowen, Conway, Crichton, Gill, Hines, Keene, Kelso, Morrison, Mullen, Murphy, Revelle, Reynolds, Sawyer, Mr. President. 15.

Absent: Hurd, Zbinden. 2.

Whereupon the following proceedings were had:

Folio 279, folio 282.

Second and Third Reading.

C. B. No. 3795, approving assessment roll L. I. D. No. 1417 for the improvement of Sixth avenue south, and other streets and avenues, under Ordinance No. 15463.

Read second and third times and passed by the following vote:

In favor: Armstrong, Bowen, Conway, Crichton, Gill, Hines, Keene, Kelso, Morrison, Mullen, Murphy, Revelle, Reynolds, Sawyer Mr. President. 15.

Against: None.

There being no objections the president signed the bill.

(C. B. No. 3795 became Ordinance No. 17981.)

Folio 284.

Thereupon the council adjourned until September 23, 1907, at 8.00 o'clock P. M.

Approved:

C. H. BURNETT, Jr.,
President of the City Council.

Attest:

H. W. CARROLL,
City Comptroller and ex-Officio City Clerk.

19 Vol. 18, folio 115.

Charter Session.

Be it remembered that the city council of the city of Seattle met in the council chamber in the city hall of the city of Seattle, Washington, on this the 16th day of March, 1908, at the hour of 8.00 o'clock P. M., pursuant to the provisions of the city charter and pursuant to adjournment heretofore had:

President Gill in the chair.

At roll call the following members were —.

Present: Armstrong, Conway, Goddard, Hines, Hurd, Jackson, McKinnon, Mullen, Murphy, Parker, Revelle, Sawyer, Sparkman, Wardall, Way, Weaver, Zbinden, Mr. President. 18.

Absent: None.

Whereupon the following proceedings were had:

Folio 118, folio 119.

Introduction of Bills.

By CONWAY:

C. B. No. 5037, appropriating money to complete improvement L. I. D. No. 1417.

Read first time and referred to Street Committee.

Folio 120.

Thereupon the council adjourned until March 2? 1908, at 8.00 o'clock P. M.

Approved:

H. C. GILL.
President of the City Council.

Attest:

H. W. CARROLL.
City Comptroller and ex-Officio City Clerk.

20 Vol. 18, folio 136.

Adjourned Session.

Be it remembered that the city council of the city of Seattle met in the council chamber in the city hall of the city of Seattle, Washington, on this the 30th day of March, 1908, at the hour of 8.00 o'clock P. M., pursuant to adjournment.

Present Gill in the chair.

At roll call the following members were —

Present Armstrong, Conway, Goddard, Hines, Hurd, Jackson, McKinnon, Mullen, Murphy, Parker, Revelle, Sawyer, Sparkman, Wardall, Weaver, Way, Zbinden, Mr. President. 18.

Absent: None.

Whereupon the following proceedings were had:

Folio 141, folio 142.

Reports of Committees.

From Street Committee:

C. B. No. 5037, appropriating money to complete improvement L. I. D. No. 1417, recommending that said bill do pass. Report adopted.

Folio 150, folio 153.

Second and Third Reading.

C. B. No. 5037, appropriating money to complete improvement L. I. D. No. 1417.

Read second and third times and passed by the following vote: In favor: Armstrong, Conway, Goddard, Hines, Hurd, Jackson, Mullen, Murphy, McKinnin, Parker, Sawyer, Sparkman, Wardall, Way, Weaver, Zbinden, Mr. President. 17.

Against: None.

21 There being no objections the president signed the bill. (C. B. No. 5037 became ordinance No. 18196.)

Folio 154.

Thereupon the council adjourned until April 6, 1908, at 8.00 o'clock P. M.

Approved:

H. C. GILL,
President of the City Council.

Attest:

H. W. CARROLL,
City Comptroller and ex-Officio City Clerk.

Vol. 20, folio 411.

Charter Session.

Be it remembered that the city council of the city of Seattle met in the council chamber in the city hall of the city of Seattle, Washington, on this the 7th day of September, 1909, at the hour of 8.00 o'clock P. M., pursuant to the provisions of the city charter and pursuant to adjournment heretofore had.

President Gill in the chair.

At roll call the following members were —

Present: Armstrong, Conway, Goddard, Hines, Hurd, Jackson, McKinnon, Mullen, Murphy, Parker, Revelle, Sawyer, Sparkman, Wardall, Way, Weaver, Zbinden, Mr. President. 18.

Absent: None.

Whereupon the following proceedings were had:

Folio 432, folio 437.

Introduction of Bills.

By SAWYER:

C. B. No. 9441, providing for a re-assessment for the improvement of Sixth avenue south, and other streets and avenues, under ordinance No. 15463, L. I. D. No. 1417.

22 Read first time and referred to Finance Committee.

Folio 444.

Thereupon the council adjourned until September 8, 1909, at 8.00 o'clock P. M.

Approved:

A. J. GODDARD,
President pro tem. of the City Council.

Attest:

H. W. CARROLL,
City Comptroller and ex-Officio City Clerk.

Vol. 20, folio 447.

Adjourned Session.

Be it remembered that the city council of the city of Seattle met in the council chamber in the city hall of the city of Seattle, Washington, on this the 13th day of September, 1909, at the hour of 8.00 o'clock P. M., pursuant to adjournment.

Councilman Goddard in the chair pro tem.

At roll call the following members were—

Present: Armstrong, Conway, Goddard, Hines, Hurd, Jackson, McKinnon, Murphy, Parker, Revelle, Sawyer, Sparkman, Wardall Way, Weaver, Zbinden. 13.

Absent: Mullin, Mr. President. 2.

Whereupon the following proceedings were had:

Folio 453, folio 454.

Reports of Committees.

From Finance Committee:

C. B. No. 9441, providing for re-assessment for the improvement of Sixth avenue south under ordinance No. 15463, L. I. D. No. 1417, recommending that same do pass. Report adopted.

23 Folio 466.

Second and Third Reading.

C. B. No. 9441, providing for a re-assessment for the improvement of Sixth avenue south, and other streets and avenues under ordinance No. 15463, L. I. D. No. 1417.

Read second and third times and passed by the following vote:
In favor: Armstrong, Hurd, Jackson, McKinnon, Parker, Revelle, Sawyer, Sparkman, Wardall, Way. 10.
Against: None.
There being no objections the president pro tem. signed the bill.
(C. B. No. 9441, became ordinance No. 21849.)

Folio 473.

Thereupon the council adjourned until September 20, 1909, at 8.00 o'clock P. M.
Approved:

H. C. GILL.
President of the City Council.

Attest:
H. W. CARROLL.
City Comptroller and ex-Officio City Clerk.

24 Vol. 22, folio 1.

Charter Session.

Be it remembered that the city council of the city of Seattle met in the council chamber in the city hall of the city of Seattle, Washington, on this the 16th day of May, 1910, at the hour of 8.00 o'clock P. M., pursuant to the provisions of the city charter and to adjournment heretofore had.
President Murphy in the chair.
At roll call the following members were—
Present: Blaine, Bohlke, Bullock, Conway, Denney, Goddard, Hart, Kellogg, Mullen, Revelle, Sawyer, Schlumpf, Wardall, Way, Weaver, Wolfe, Zbinden, Mr. President. 18.
Absent: None.
Whereupon the following proceedings were had:

Folio 12.

Introduction of Resolutions.

By Judiciary Committee:

Res. No. 2780, providing for notice of re-assessment roll for the improvement of Sixth Avenue South, L. I. D. No. 1417, and setting June 20th, 1910, at 8.00 o'clock P. M. for hearing thereon.
Adopted by the following vote:
In favor: Blaine, Bohlke, Bullock, Conway, Denney, Goddard, Hart, Kellogg, Mullen, Revelle, Sawyer, Schlumpf, Wardall, Way, Wolfe, Zbinden, Mr. President.
Against: None. Weaver being without the bar of the council.
There being no objections the president signed the resolution.

Folio 24.

Thereupon the council adjourned until May 23rd, 1910, at 8.00 o'clock P. M.

Approved:

WM. H. MURPHY,
President of the City Council.

Attest:

WM. J. BOTHWELL,
City Comptroller and ex-Officio City Clerk.

25 Vol. 22, folio 109.

Charter Session.

Be it remembered that the city council of the city of Seattle met in the council chamber in the city hall of the city of Seattle, Washington, on this the 20th day of June, 1910, at the hour of 8.00 o'clock P. M., pursuant to the provisions of the city charter and to adjournment heretofore had:

President Murphy in the chair.

At roll call the following members were—

Present: Blaine, Bohlke, Bullock, Conway, Denney, Goddard, Hart, Kelley, Mullen, Revelle, Sawyer, Schlumpf, Wardall, Way, Weaver, Wolfe, Zbinden, Mr. President. 18.

Absent: None.

Whereupon the following proceedings were had:

Special Order.

Pursuant to Resolution No. 2780, adopted May 16, 1910, and notice given thereunder, the council did then proceed to consider the matter of the approval of re-assessment roll L. I. D. No. 1417, for the improvement of Sixth Avenue South, from Seattle Boulevard at Charles street, and other streets and avenues, by constructing plank roadways thereon under Ordinance No. 15463. The clerk laid before the council the affidavit of the publisher of the Seattle Daily Bulletin, the city official newspaper, that said notice had been published in said paper for the period of ten days, commencing May 17, 1910, and ending May 27, 1910; also No. 40747 and 40774, being protests against such said assessment roll. No other protests were presented. Upon motion said protests were ordered placed on file and said assessment roll approved.

Folio 120.

Introduction of Bills.

By Judiciary Committee:

26 C. B. No. 12342, approving re-assessment roll, L. I. D. No. 1417, for the improvement of Sixth Avenue south by plank roadway, under ordinance No. 21849.

Read first time.

Folio 126.

Thereupon the council adjourned until June 27, 1910, at 8.00 o'clock P. M.

Approved:

WM. H. MURPHY,
President of the City Council.

Attest:

WM. J. BOTHWELL,
City Comptroller and ex-Officio City Clerk.

Vol. 22, folio 127.

Adjourned Session.

Be it remembered that the city council of the city of Seattle met in the council chamber in the city hall of the city of Seattle, Washington, on this the 27th day of June, 1910, at the hour of 8.00 o'clock P. M., pursuant to adjournment heretofore had.

President Murphy in the chair.

At roll call the following members were—

Present: Blaine, Bohlke, Bullock, Conway, Denney, Goddard, Hart, Kellogg, Mullen, Revelle, Sawyer, Schlumpf, Wardall, Way, Weaver, Wolfe, Mr. President. 17.

Absent: Zbinden. 1.

Whereupon the following proceedings were had:

Folio 144, folio 145.

Second and Third Reading.

C. B. No. 12312, approving re-assessment roll L. I. D. No. 1417, for the improvement of Sixth avenue south under ordinance No. 21849.

27 Read second and third times and passed by the following vote:

In favor: Blaine, Bohlke, Bullock, Conway, Denney, Hart, Kellogg, Mullen, Revelle, Sawyer, Schlumpf, Way, Weaver, Mr. President. 15.

Against: None.

There being no objections the president signed the bill.

(C. B. 12312 became Ordinance No. 24498.)

Folio 149.

Thereupon the council adjourned until July 5, 1910, at 8.00 o'clock P. M.

Approved:

WM. H. MURPHY,
President of the City Council.

Attest:

WM. J. BOTHWELL,
City Comptroller and ex-Officio City Clerk.

28 Resolution No. 443.

Be it resolved by the City Council of the City of Seattle:

(1) That it is the intention of the city council to order the improvement of Sixth Avenue South from Seattle Boulevard at Charles Street to its intersection with Charlestown street; thence easterly along Charlestown Street to Eighth Avenue South, by the construction of a plank roadway thirty (30) feet in width with wooden walks six (6) feet in width along one side thereof, all in accordance with plans to be prepared by the city engineer.

(2) That the mode of making payment for the cost and expense of such improvement shall be made by the mode of "Immediate Payment" as provided by the charter and ordinances of the City of Seattle and laws of the State of Washington. The assessment for the cost of said improvement, so far as the same is to be borne by the abutting proximate and contiguous property, to be in accordance with the benefits conferred thereon.

(3) That the board of public works be and it is hereby directed to report to the council the estimated cost of such improvement, a description of the property which will be specially benefited thereby, and a statement of the proportionate amount of the cost and expense of such improvement which should be borne by such property.

(4) That all persons who desire to object to said improvement are notified to appear at a meeting of the council to be held in the council chamber in the city hall of the city of Seattle, on the 4th day of February, 1907, at 8.00 o'clock P. M. of said day (being a day not less than thirty days after the passage hereof) and present
29 their objections; at which time the council will consider any objections made and the report of the board of public works upon the matters referred to it in this resolution, and any person interested may appear before the council at said time and state his objections to such improvement.

Passed the city council the 31st day of December, 1906, and signed by me in open session in authentication of its passage this 31st day of December, 1906.

D. W. BOWEN,
President of the City Council.

Filed by me this 31st day of December, 1906.

H. W. CARROLL,
City Comptroller and ex-Officio City Clerk.

Date of first publication Jan. 3, 1907.

H. W. CARROLL,
City Comptroller and ex-Officio City Clerk.
By R. L. WARSON,
Deputy Clerk.

30 Ordinance No. 15463.

An ordinance providing for the improvement of Sixth Avenue South, from Seattle Boulevard at Charles Street to its intersection with Charlestown Street, thence easterly along Charlestown Street to Eighth Avenue South, by constructing a plank roadway thirty (30) feet in width thereon, with wooden sidewalks six (6) feet in width along one side thereof, in accordance with Resolution No. 443 of the city council of the city of Seattle, and providing for the payment thereof by the mode of "Immediate Payment" under the provisions of Ordinance No. 5693 of said city, approved December 6, 1899.

Be it ordained by the City of Seattle as follows:

Section 1. That Sixth avenue south, from Seattle Boulevard at Charles Street to its intersection with Charlestown Street; thence easterly along Charlestown Street to Eighth Avenue South be improved by constructing a plank roadway thirty (30) feet in width thereon, with wooden sidewalks six (6) feet in width along one side thereof, according to the plans and specifications prepared under the direction of the city engineer and on file in the office of the department of public works; and that an assessment be levied and collected upon all lots and parcels of land benefited by such improvement to defray the cost and expense thereof, which assessment shall become a first lien upon the property liable therefor. Said improvement shall be made by contract, to be let to the lowest and best bidder therefor by the board of public works; and that said board is hereby authorized and directed forthwith to procure bids therefor and to enter into a contract for said improvement in the name of the city.

31 Sec. 2. That there is hereby established a local improvement district, to be designated as "Local Improvement District No. 14147," which said district is described as follows:

"All the property abutting adjacent or proximate to said portion of said streets and avenues specially benefited by such improvement to such distance back from the marginal lines thereof as prescribed by the city charter."

The property included within said local improvement district, and none other, shall be deemed to be and shall be the property specially benefited by said improvement; and the total cost and expense of the improvement herein ordered, including all necessary incidental expenses, shall be defrayed by the collection of a special assessment upon the property included in said local improvement district, which assessment shall be made upon said property in all respects as provided by ordinance No. 5693 of said city, approved December 6, 1899.

Sec 3. That the mode of making payment for said local improvement shall be by the mode of "Immediate Payment," as defined by said Ordinance No. 5693, and an assessment roll shall be prepared and reported to the city council, and other proceedings had thereon, as are prescribed by said mode of "Immediate Payment."

SEC. 4. That said improvement shall be made under the supervision of the board of public works, which board is hereby ordered to proceed with said improvement.

SEC. 5. That this ordinance shall take effect and be in force from and after its passage and approval, if approved by the mayor; otherwise it shall take effect at the time it shall become a law under
32 the provisions of the city charter.

Passed the city council the 18th day of February, 1907, and signed by me in open session in authentication of its passage this 18th day of February, 1907.

D. W. BOWEN,
President of the City Council.

Approved by me this 23rd day of February, 1907.
WM. HICKMAN MOORE, *Mayor.*

Filed by me this 23rd day of February, 1907.
Attest:
[SEAL.] H. W. CARROLL,
City Comptroller and ex-Officio City Clerk.

H. W. CARROLL,
City Comptroller and ex-Officio City Clerk.
By R. L. WARSON,
Deputy Clerk.

33 Ordinance No. 27849.

An Ordinance authorizing and directing the levying and collection of a new assessment or reassessment to pay the cost and expense of and for the improvement of Sixth Avenue South, as specified and provided for in Ordinance No. 15463, and providing for the payment therefor.

Whereas, Under Ordinance No. 15463, of the City of Seattle, creating Local Improvement District No. 1117, there was improved Sixth Avenue South, from Seattle Boulevard at Charles Street to its intersection with Charlestown street; thence easterly along Charlestown street to Eighth avenue south, by constructing a plank roadway thirty (30) feet in width thereon, with wooden sidewalks six (6) feet in width along one side thereof, which improvement was made as therein provided for; and

Whereas, an assessment, which became delinquent and due October 31, 1907, under the mode of "Immediate Payment," and upon which interest began to run on October 31, 1907, was levied and warrants issued to pay for said improvement; and

Whereas, among other property especially benefited by such improvement were certain leasehold interests in certain tide land lots owned by the state of Washington; and

Whereas, certain assessments for such improvement were levied and assessed against such tide land lots, which assessments included the assessments against such leasehold interests, respectively, therein, but such leasehold interests were not assessed as separate entities from the fee in such respective tide land lots owned by the state of Washington; and

Whereas, the enforcement of the collection of such assessments against such leasehold interests has been refused by the
34 courts of this state, inasmuch as such assessments were not made against such leasehold interests respectively, but were made upon the entire property in such cases.

Now, therefore, be it ordained by the City of Seattle as follows:

SECTION 1. That a new assessment or re-assessment shall be made and collected according to law upon all lots, tracts and parcels of land and parts thereof, and other property specially benefited by the improvement of Sixth Avenue South, in the city of Seattle, from Seattle Boulevard at Charles street to its intersection with Charlestown street; thence easterly along Charlestown street to Eighth avenue south, as ordered by ordinance No. 15463, creating Local Improvement District No. 1417 of the City of Seattle, and the board of public works is hereby directed to prepare a new assessment or reassessment roll in accordance with law showing the amounts chargeable to the various lots, tracts and parcels of land, and parts thereof, and other property specially benefited by said improvement at the time of said original assessment, to which amounts interest shall be added and credits given as hereinafter provided.

SECTION 2. That the City Treasurer be and he hereby is authorized, empowered and directed, on receipt of the approved reassessment roll, to credit the property therein specified with any payments already made for said property on account of the assessment heretofore levied to pay for said improvement and to charge the property therein specified with interest on the amount found due in the reassessment roll herein provided for, to the end that payments shall be made and the warrants already issued shall be redeemed, as near as may be, in the same manner as though the re-
assessment herein provided for had been levied at the time the
35 original assessment was levied.

SECTION 3. This ordinance shall take effect and be in force thirty days from and after its passage and approval, if approved by the mayor; otherwise it shall take effect at the time it shall become a law under the provisions of the city charter.

Passed the city council the 13th day of September, 1909, and signed by me in open session in authentication of its passage this 13th day of September, 1909.

E. W. WAY,
President pro Tem. of the City Council.

Approved by me this 22nd day of September, 1909.
JOHN F. MILLER, *Mayor.*

Filed by me this 22nd day of September, 1909.
Attest:
[SEAL.]
H. W. CARROLL,
City Comptroller and ex-Officio City Clerk.

Published September 25, 1909.

H. W. CARROLL,
City Comptroller and ex-Officio City Clerk.
By R. L. WARSON,
Deputy Clerk.

36 In the Superior Court of the State of Washington for the County of King.

No. —.

In the Matter of the Reassessment for the Improvement of Sixth Avenue South and Other Streets under Ordinance No. 15463, Comprising Improvement District No. 1417.

Appeal of William P. Trimble and Cannie F. Trimble from the said Assessment.

Stipulation as to Transcript.

It is hereby stipulated and agreed that the record or transcript on appeal in this matter shall contain among other things the first page of the said reassessment roll, all the pages of said roll containing the property of the appellants mentioned in this appeal, the last page of said roll and all the certificates attached to said roll, and need not contain more of said roll.

It is further agreed that the bond on appeal for the sum of $300 with the Fidelity and Deposit Company of Maryland as surety, is sufficient in amount and the surety good, and that an order may be made without notice on the presentation of this stipulation approving the said bond, and the surety thereon and the amount thereof.

It is further agreed that the city of Seattle does not waive any objection or exception to the said appeal or the proceedings taken therein, except as to the said roll and the approval of the said bond, and that the said city may notwithstanding this stipulation urge any exception or objection to the said appeal otherwise open to it.

Dated July 7th, 1910.

GEO. McKAY,
Attorneys for Appellants.
SCOTT CALHOUN AND
H. A. HANSON,
Attorneys for City of Seattle.

37 Page 1.

The City of Seattle.

Reassessment Roll, as authorized by Ordinance No. 21849, for Local Improvement District No. 1417, created by Ordinance No. 15463, entitled "An Ordinance providing for the improvement of Sixth Avenue South, from Seattle Boulevard at Charles Street to its intersection with Charlestown street; thence easterly along Charlestown street to Eighth Avenue South, by constructing a plank roadway thirty (30) feet in width thereon, with wooden sidewalks six (6) feet in width along one side thereof, in accordance with resolution No. 443 of the city council of the City of Seattle, and providing for the payment therefor by the mode of "Immediate Payment", under the provisions of Ordinance No. 5693 of said city, approved December 6, 1899:

(Page 14.)

Name of owner (when known).	Description of real estate.	Total assessed cost for whole lot or portion thereof assessed
William P. Trimble	West 120 feet of lot 1, Block 256, Seattle Tide Lands.....	$361.20
"	West 120 feet of lot 2, Block 256, Seattle Tide Lands.....	252.00

(Page 15.)

William P. Trimble,	West 120 feet of lot 3, block 256, Seattle Tide Lands.....	252.00
"	West 120 feet of lot 4, block 256, Seattle Tide Lands.....	252.00

(Page 17.)

W. P. Trimble,	Lot 4, Block 263, except North 63.29 feet Seattle Tide Lands...	111.00
38		

(Page 18.)

William P. Trimble	Leasehold interest in following: Portion of lot 20, block 271, Seattle Tide Lands, lying east of a line 120 feet west from and parallel with the west line of Sixth Avenue South.....	2.28
"	Leasehold interest in following: Portion of lot 21, block 271, Seattle Tide Lands, lying east of a line 120 feet west from and parallel with the west line of Sixth Avenue South.....	50.76

(Page 19.)

William P. Trimble,	Leasehold interest in following: Portion of lot 22, block 271, Seattle Tide Lands, lying east of a line 120 feet west from and parallel with the west line of Sixth Avenue South.....	159.97
"	Leasehold interest in following: East 120 feet of lot 23, block 271, Seattle Tide Lands.....	214.20
"	Leasehold interest in following: East 120 feet of lot 24, block 271, Seattle Tide Lands.....	214.20
"	Leasehold interest in following: East 120 feet of lot 25, block 271, Seattle Tide Lands.....	214.20
"	Leasehold interest in following: East 120 feet of lot 26, block 271, Seattle Tide Lands.....	214.20

39 (Page 20.)

William P. Trimble.	Leasehold int. in following: East 120 feet of lot 27, block 271, Seattle Tide Lands.....	214.20
"	Leasehold int. in following: East 120 feet of Lot 28, block 271, Seattle Tide Lands.....	214.20
"	Leasehold int. in following: East 120 feet of lot 29, block 271, Seattle Tide Lands.....	178.50
"	Leasehold int. in following: East 120 feet of lot 12, block 272, Seattle Tide Lands.....	214.20
"	Leasehold int. in following: East 120 feet of lot 13, block 272, Seattle Tide Lands.....	214.20

(Page 21.)

William P. Trimble.	Leasehold int. in following: East 120 feet of lot 14, block 272, Seattle Tide Lands.....	214.20
"	Leasehold int. in following: East 120 feet of lot 15, block 272, Seattle Tide Lands.....	214.20
"	Leasehold int. in following: East 120 feet of lot 16, block 272, Seattle Tide Lands.....	214.20
"	Leasehold int. in following: East 120 feet of lot 17, block 272, Seattle Tide Lands.....	214.20
"	Leasehold int. in following: East 120 feet of lot 18, block 272, Seattle Tide Lands.....	214.20

40 (Page 22.)

William P. Trimble.	Leasehold int. in following: East 120 feet of lot 19, block 272, Seattle Tide Lands.....	214.20
"	Leasehold int. in following: East 120 feet of lot 20, block 272, Seattle Tide Lands.....	214.20
"	Leasehold int. in following: East 120 feet of lot 21, block 272, Seattle Tide Lands.....	214.20
"	Leasehold int. in following: East 120 feet of lot 22, block 272, Seattle Tide Lands.....	307.02

41 *Statements, Remarks, etc.*

(Last page.)

Assessed against property	$67,635.54
Payable from General Fund by Ordinance	00.00
Total	$67,635.54

Certificates.

City Engineer's Certificate.

STATE OF WASHINGTON,
County of King, City of Seattle, ss:

I, the undersigned, city engineer of the city of Seattle, hereby certify that the within re-assessment roll for local improvement district No. 1417 has been prepared by me and that the same is correct.

Witness my hand this 6th day of May, 1910.

R. H. THOMSON,
City Engineer.
By D. W. McMORRIS,
Ass't Engineer.

Certificate of the Board of Public Works.

STATE OF WASHINGTON,
County of King, City of Seattle, ss:

We, the board of public works of the city of Seattle hereby report to the city council the within re-assessment roll prepared by the city engineer for local improvement district No. 1417, created by Ordinance No. 15463 of the city of Seattle approved February 25rd, 1907, as authorized by Ordinance No. 21849 of the city of Seattle, entitled "An Ordinance authorizing and directing the levy and collection of a new assessment or re-assessment to pay the cost and expense of and for the improvement of Sixth Avenue South in the city of Seattle, as specified and provided for in Ordinance No. 15463 of the city of

42 Seattle, and providing for the payment therefor" and approved September 22nd, 1909, and we do hereby certify that the contract for said improvement was let on the 14th day of May, 1907, and that the said re-assessment roll contains the description of each lot or parcel of land or part thereof assessed for said improvement, with the amount to be charged and assessed against each of such lots or parcels of land or parts thereof in proportion to the special benefits received by each such lot or parcel of land or part thereof from such improvement, and the name of the owner of each such lots or parcels of land or parts thereof, if known; that such roll contains an equitable re-assessment of the lots, blocks and parcels of land benefited by said improvement and has been made with reference to the benefits received to the extent of their proportionate part of the expense thereof, based on the actual cost and value of said improvement at the time of its completion.

And we do further certify that said roll is true and correct and in accordance with the city charter and laws of the state of Washington.

In witness whereof, said board of public works has caused these presents to be signed by its chairman and secretary this 6th day of May, A. D. 1910.

R. H. THOMPSON,
Chairman of Board of Public Works.
C. B. BAGLEY,
Secretary of Board of Public Works.

43 City Comptroller and ex-Officio City Clerk's Certificate.

STATE OF WASHINGTON,
County of King, City of Seattle, ss:

I, the undersigned city comptroller and ex-officio city clerk of the city of Seattle, hereby certify that the within and foregoing re-assessment roll of local improvement district No. 1417 for the improvement of Sixth Avenue South et al. is the original re-assessment roll for said local improvement district as considered, corrected and approved by the city council.

Witness my hand and seal of said city of Seattle this 13th day of July, 1910.

WM. J. BOTHWELL,
City Comptroller & ex-Officio City Clerk.
By JOHN BEEK, *Deputy.*

City Comptroller's Certificate.

STATE OF WASHINGTON,
County of King, City of Seattle, ss:

I, Wm. J. Bothwell, city comptroller of the city of Seattle, certify that I have this day delivered to Ed. L. Terry, City Treasurer of the City of Seattle, a true and correct copy of the within, being the re-assessment roll for local improvement district No. 1417, created by Ordinance No. 15463, for the improvement of Sixth Avenue South et al.

In witness whereof I have hereunto set my hand this — day of ——, 1910.

—— ——,
City Comptroller,
By —— ——, *Deputy.*

44 *Resolution No.* 2780.

A Resolution Providing for a Notice of Re-assessment Roll for Local Improvement District No. 1417 for the Improvement of Sixth Avenue South, under Ordinance No. 15463.

Whereas, heretofore the city council of the city of Seattle duly passed Ordinance No. 15463 for the improvement of Sixth Avenue South, and

Whereas, after proceedings were duly had, an assessment roll was prepared, levying and assessing the property benefited by said improvement, in the manner provided by law, and said assessment roll was duly approved by Ordinance No. 16891, and

Whereas, The city council of the city of Seattle duly passed Ordinance No. 21849, providing for the levying and collection of a new assessment or re-assessment, to pay the cost and expense of and for the improvement of Sixth Avenue South, and

Whereas, the board of public works of the city of Seattle heretofore on the 6th day of May, 1910, has reported to the city council a new assessment roll or re-assessment roll, prepared by the city engineer in pursuance of said ordinance No. 21849, which said roll contains the description of each lot and parcel of land and part thereof to be assessed for said improvement, with all the matters and things required by law, and the charter and ordinances of the city of Seattle to be contained in such roll, the district therein contained to be known as district No. 1417.

Now, Therefore, be it Resolved by the City Council of the City of Seattle: That the city comptroller and ex-officio city clerk be
45 and he is hereby directed to publish in the official newspaper of the city of Seattle for ten consecutive issues a notice of roll and assessment, notifying all persons interested that said roll has been reported to the city council and filed with the city comptroller and ex-officio city clerk, and requiring them to appear before the city council at a session thereof to be held in the council chamber at the city hall on Monday, the 20th day of June, 1910, being a day not less than fifteen days from the date of the last publication of such notice and make objections thereto, if any they have, at which time and place the council will consider any and all objections made, and will make such corrections in said roll as it deems just and shall by ordinance approve such roll when found correct, and shall levy and assess the amounts thereof prescribed by the city charter and ordinances and general laws in relation thereto. Said matter may be adjourned to a later date if so ordered by the city council. And be it further

Resolved that there be a session of the city council on said 20th day of June, 1910, at 8:00 o'clock P. M. for the purpose of taking action on said assessment roll as hereinbefore set forth.

Passed by the city council the 16th day of May, 1910, and signed by me in open session in authentication of its passage this 16th day of May, 1910.

WM. H. MURPHY,
President of the City Council.

Filed by me this 16th day of May, 1910.

WM. J. BOTHWELL,
City Comptroller and ex-Officio City Clerk.

46 *Notice of Assessment Roll.*

Notice is hereby given that the new assessment or re-assessment roll of Local Improvement District No. 1417 for the improvement of Sixth Avenue South, from Seattle Boulevard at Charles Street to its intersection with Charlestown Street; thence easterly along Charlestown Street to Eighth Avenue South, as ordered by Ordinance No. 45463 of the City of Seattle, creating Local Improvement district No. 1417, by constructing a plank roadway thirty (30) feet in width thereon, with wooden sidewalks six (6) feet in width along one side thereof, has been reported by the board of public works to the city council of the city of Seattle, and is now on file in the office of the city comptroller and ex-officio city clerk and that the same is now open for public inspection at said office and will remain open for inspection until Monday, the 20th day of June, 1910, at 5 o'clock P. M., and all persons interested are hereby required to appear before the city council at a session thereof to be held in the council chamber in the city hall on said 20th day of June, 1910, at 8 o'clock P. M., and make any and all objections they may have to said roll or any part thereof. At the time herein fixed and at such other times as the hearing on said new assessment or re-assessment roll may be continued to, the city council will sit as a board of equalization for the purpose of correcting or amending said roll; and at such hearing said council will consider any and all objections made and will proceed to confirm all assessments shown thereon, or lower, raise or otherwise modify the same or make corrections therein, as in its discretion may be deemed just, and will then by ordinance approve such roll and
levy and assess the amounts thereof against each parcel and
47 lot of land, and part thereof shown in said roll, and declare the same as a first lien thereon.

Notice is further given that after such hearing on such new assessment or re-assessment roll, and the approval thereof by the city council, and upon receipt thereof by the city treasurer for collection in the manner provided by law, such treasurer is authorized, empowered and directed to credit the property therein specified with any payments already made for said property on account of the assessment heretofore levied to pay for said improvement and to charge the property therein specified with interest on the amount found due in the reassessment roll herein provided for, to the end that payments shall be made, and the warrants already issued shall be redeemed, as near as may be, in the same manner as though the re-assessments herein provided for had been levied at the time the original assessment was levied.

Said matter may be adjourned to a later date if so desired by the city council.

WM. J. BOTHWELL,
City Comptroller and ex-Officio City Clerk.

Date of first publication May 17, 1910

48 *Affidavit of Publication.*

STATE OF WASHINGTON,
County of King, ss:

Joseph Blethen, being duly sworn, says he is the publisher of the Seattle Daily Bulletin, a daily newspaper, printed and published at Seattle, King County, State of Washington; that it is a newspaper of general circulation in said county and state, and that the annexed, being Notice of Assessment 1417, was published in said newspaper, and not in a supplement thereof, and is a true copy of the notice as it was published in the regular and entire issue of said paper for a period of ten days, commencing on the 17th day of May, 1910, and ending on the 27th day of May, 1910, and that the said newspaper was regularly distributed to its subscribers during all of said period.

JOSEPH BLETHEN.

Subscribed and sworn to before me this 27th day of May, 1910.

F. D. HAMMONS,

[SEAL.] *Notary Public in and for the State of Washington, Residing at Seattle.*

49 Before the City Council of the City of Seattle.

In the matter of the re-assessment for the improvement of Sixth Avenue South and other streets, under Ordinance No. 15463, comprising improvement district No. 1417.

William P. Trimble and Cannie F. Trimble, his wife, object to and protest against the said assessment and for grounds of objection and protest allege:

I.

That they are the owners in fee simple of the following described lands re-assessed on said roll, to-wit:

West 120 ft. Lot 1, Blk. 256, Seattle Tide Lands, assessed							$8,361 20
" 120 " " 2, " 256, "							252 00
" 120 " " 3, " 256, "							252 00
" 120 " " 4, " 256, "							252 00
Lot 4, except North 63.29 ft. Blk. 263	"	"	"				111 00

II.

That they are the owners of a leasehold interest in the lands hereinafter next described; that the state of Washington is the owner of the fee in said lands; that they have no interest in said lands except the said leasehold which runs for 19 years only; said lands are described as follows:

East	120	ft.	lot	23,	Blk.	271,	Seattle	Tide	Lands,	assessed	..	$214.20
"	120	"	"	24	"	271	"	"	"	"	..	214.20
"	"	"	"	25	"	271	"	"	"	"	..	214.20
"	"	"	"	26	"	271	"	"	"	"	..	214.20
"	"	"	"	27	"	271	"	"	"	"	..	214.20
"	"	"	"	28	"	271	"	"	"	"	..	214.20
"	"	"	"	29	"	271	"	"	"	"	..	214.20
"	"	"	"	12	"	272	"	"	"	"	..	214.20
"	"	"	"	13	"	272	"	"	"	"	..	214.20
"	"	"	"	14	"	272	"	"	"	"	..	214.20
"	"	"	"	15	"	272	"	"	"	"	..	214.20
"	"	"	"	16	"	272	"	"	"	"	..	214.20
"	"	"	"	17	"	272	"	"	"	"	..	214.20
"	"	"	"	18	"	272	"	"	"	"	..	214.20
50												
"	"	"	"	19	"	272	"	"	"	"	..	214.20
"	"	"	"	20	"	272	"	"	"	"	..	214.20
"	"	"	"	21	"	272	"	"	"	"	..	214.20
"	"	"	"	22	"	272	"	"	"	"	..	307.02

III.

That the said re-assessment is irregular, illegal and void and in violation of the rights secured to these protestants by the laws and constitution of the state of Washington and the constitution of the United States.

IV.

That the said city has not, nor has the said city council or any officer or agent of the said city any right, jurisdiction or authority to make the said re-assessment.

V.

That the said Ordinance No. 15463 is unconstitutional, illegal and void; that the original assessment has not been declared illegal; that the city of Seattle has not nor has any officer of the said city any right, jurisdiction or authority to set aside the original assessment nor has the original assessment been set aside; that the improvement for which the said assessment was made is not adjacent to the said property and the said leasehold property of these protestants; that the said improvement consists of a planked bridge built along the center of Sixth Avenue South and distant 30 feet or thereabouts from the said property and the said leasehold interest, and that these protestants have no means of access from the assessed property to the said bridge or planked way, and that said planking is of no benefit to the said property or the said leasehold interest, and that said property and said leasehold interest are not adjacent to said improvement and do not abut thereon.

51 VI.

That since the said improvement was made and since the original assessment was made, the city has elevated the grade along the said street and the said planked way 26 feet or thereabouts above the grade and level of said planking and has thereby destroyed all value of the said improvement; that said planked way or bridge was not built to benefit the adjacent property and does not benefit the adjacent property, but said bridge or planked way was built for the benefit of other property beyond the improvement district and beyond the termini of said improvement and not included in the said district; that the entire proportional share chargeable against the fee in said leasehold lands is assessed against said leasehold interest.

Wherefore, these protestants ask that the said re-assessment be set aside.

WM. P. TRIMBLE.
CANNIE F. TRIMBLE.

STATE OF WASHINGTON,
County of King, ss:

William P. Trimble, being first duly sworn, on oath, deposes and says that he is one of the above named protestants; that he has heard the foregoing protest read; knows the contents thereof and believes *it* to be true.

WM. P. TRIMBLE.

Subscribed and sworn to before me this 20th day of June, 1910.

R. E. THOMPSON, JR.,
[SEAL.] *Notary Public in and for the State of Washington, residing at Seattle.*

52 (Back).

Filed No. 40774. Re-assessment, L. I. D. No. 1417—6th Ave. South. Protest of Wm. P. Trimble and wife. Filed June 20th, 1910. Wm. J. Bothwell, City Comptroller, by E. M. Street, Deputy.

53 Ordinance No. 24198.

An ordinance approving the new assessment or re-assessment roll of Local Improvement District No. 1417 for the improvement of Sixth Avenue South, from Seattle Boulevard at Charles Street to its intersection with Charlestown street, thence easterly along Charlestown street to Eighth avenue south, by constructing a plank roadway thirty (30) feet in width thereon, with wooden sidewalks six (6) feet in width along one side thereof, as provided for and specified in Ordinance No. 15463, under Ordinance No. 24849, and levying and assessing the amounts thereof shown in said roll, and providing for the collection thereof.

Be it ordained by the City of Seattle as follows:

SECTION 1. That the new assessment or re-assessment roll for local improvement district No. 1417 for the improvement of Sixth Avenue

South, from Seattle Boulevard at Charles Street, to its intersection with Charlestown street; thence easterly along Charlestown street to Eighth avenue south, by constructing a plank roadway thirty (30) feet in width thereon, with wooden sidewalks six (6) feet in width along one side thereof, as provided for and specified in ordinance No. 15463, under ordinance No. 21849, as the same now stands, be, and the same is, hereby in all things approved.

SECTION 2. That each parcel and lot of land and part thereof named in said roll is specially benefited by said improvement, and that there be and is hereby assessed against each parcel and
54 lot of land and part thereof contained in said improvement district, as shown in said roll, the respective amounts therein set against such parcel and lot of land and part thereof, between the termini of said improvement abutting upon, adjacent or proximate to said streets and said amounts are hereby declared to be a first lien against each said parcel and lot of land and part thereof against which the same is assessed in said roll; the amount hereby assessed and levied against the property in said local improvement district being the sum of sixty-seven thousand six hundred thirty-five and fifty-four one-hundredths ($67,635.54) Dollars.

SECTION 3. Said roll shall be delivered to the city comptroller, who shall forthwith deliver to the city treasurer a certified copy thereof, upon receipt of which the treasurer shall proceed to collect the respective amounts thereof in the manner provided by law. The city treasurer shall give such notice and take such proceedings for the collection of said respective amounts so levied and assessed as are prescribed by the charter and ordinances of the city of Seattle and laws of the state of Washington, and if the same be not paid within the time fixed therefor, there shall be added thereto the penalty, interest and charges fixed by the charter and ordinances of said city, and other proceedings had thereon, as provided by law and the city charter. The city treasurer shall proceed, after the first publication of said notice, with all due diligence, with the collection of said assessments.

SECTION 4. Upon receipt of such new assessment or reassessment roll, the city treasurer shall credit the property therein specified with any payments already made for said property on account of
55 the original assessment heretofore levied to pay for said improvement, and shall charge the property therein specified with interest on the amount found due in the new assessment or reassessment roll herein approved, to the end that payments shall be made and warrants already issued shall be redeemed, as near as may be, in the same manner as though such new assessment or reassessment had been levied and assessed at the time the original assessment was levied and assessed.

SECTION 5. This ordinance shall take effect and be in force thirty days from and after its passage and approval, if approved by the mayor; otherwise it shall take effect at the time it shall become a law under the provisions of the city charter.

Passed the city council the 27th day of June, 1910, and signed by

me in open session in authentication of its passage this 27th day of June, 1910.

WM. H. MURPHY,
President of the City Council.

Approved by me this 30th day of June, 1910.

H. C. GILL, *Mayor.*

Filed by me this 30th day of June, 1910.

Attest: WM. J. BOTHWELL,
City Comptroller and ex-Officio City Clerk.

[SEAL.] By A. E. ASHCRAFT,
Deputy Clerk.

56 Before the City Council of the City of Seattle.

In the Matter of the Re-assessment for the Improvement of Sixth Avenue South and Other Streets under Ordinance No. 15463, Comprising Improvement District No. 1417.

Notice of Appeal of William P. Trimble and Cannie F. Trimble, His Wife.

William P. Trimble and Cannie F. Trimble, his wife, object to and protest against the said assessment and re-assessment and for ground of objection and appeal allege:

I.

That they are the owners in fee of the following described lands re-assessed on said roll, to-wit:

West 120 ft. lot 1, block 256, Seattle Tide Lands, assessed . .	$361.20
West 120 ft. lot 2, block 256, Seattle Tide Lands, assessed . .	252.00
West 120 ft. lot 3, block 256, Seattle Tide Lands, assessed . .	252.00
West 120 ft. lot 4, block 256, Seattle Tide Lands, assessed . .	252.00
Lot 4, exc. North 63.29 ft. blk. 262 " " " " . .	111.00

II.

That they are the owners of a leasehold interest in the lands hereinafter next described; that the state of Washington is the owner of the fee in said lands; that they have no interest in said lands except the said leasehold which runs for nineteen years only; said lands are described as follows:

East 120 ft. of lot	23,	blk. 271,	Seattle Tide Lands, assessed	$214.20
" " " " "	24	271	" "	214.20
" " " " "	25	271	" "	214.20
" " " " "	26	271	" "	214.20
" " " " "	27	271	" "	214.20
" " " " "	28	271	" "	214.20
" " " " "	29	271	" "	178.50
" " " " "	12	272	" "	214.20
" " " " "	13	272	" "	214.20
" " " " "	14	272	" "	214.20
" " " " "	15	272	" "	214.20
" " " " "	16	272	" "	214.20
" " " " "	17	272	" "	214.20
" " " " "	18	272	" "	214.20

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East 120 ft. of lot	19,	Blk.	272,	Seattle Tide Lands,	assessed		214.20
" " " " "	20		272	"	"		214.20
" " " " "	21		272	"	"		214.20
" " " " "	22		272	"	"		307.02
Por. of	"	20	271	"	"		2.28
" "	"	21	271	"	"		50.76
" "	"	22	271	"	"		110.97

III.

That the said re-assessment is irregular, illegal and void and in violation of the rights secured to these protestants and appellants by the laws and constitution of the state of Washington and the constitution of the United States.

IV.

The said assessment and the said re-assessment are in violation of the covenants and terms and provisions of the leases by which the said appellants hold the said leased land from the state of Washington, and the said assessment and the said re-assessment and the statutes attempting to authorize the said assessment and re-assessment impair the obligations of the contract claimed in the said lease.

V.

That the said city has not nor has the said city council or any officer or agent of the said city any right, jurisdiction or authority to make the said re-assessment.

VI.

The said leasehold interests are chattels and are not subject to special assessments for local improvements.

VII.

The said ordinance No. 15463 is illegal, unconstitutional and void.

58

VIII.

That ordinance No. 21849 is illegal, unconstitutional and void.

IX.

The original assessment has not been declared irregular, illegal or void, and is still in force as made.

X.

That the city of Seattle has not nor has the common council of said city, nor has any officer of said city, any authority to make the said re-assessment or to include the said leasehold interest in said re-assessment.

XI.

That the said property, so assessed as aforesaid, is not adjacent to, nor does any of it abut upon the said improvement or any part thereof; that the said improvement consists of a planked way or bridge extending along the center of the said street, the edges of which planked way or bridge are distant 30 feet or thereabouts from the said property; and these appellants have no means of access from their said leasehold and other property to the said planked way or bridge, and that said improvement is of no benefit to the said leasehold and other property of these appellants; that the said planked way or bridge was not built to benefit the said property of these appellants and does not benefit their said property, but the said bridge or way was built for the benefit of other property beyond the termini of said improvement and the said assessment district and which property so benefited and for the benefit of which the said improvement was constructed, is not included in the said improvement district.

59

XII.

That the assessment chargeable against the land owned by the State of Washington is attempted to be levied on the said leasehold interests of these appellants.

XIII.

That since the said improvement was made and since the original assessment was made, the city has elevated the grade along the said street and the said planked way 26 feet or thereabouts above the grade and level of said planking and has thereby destroyed all value of the said improvement.

Wherefore, these appellants appeal from said assessment and reassessment to the superior court of the state of Washington for King county, and notice of said appeal is hereby given to the said city and its officers and agents.

WILLIAM P. TRIMBLE,
CANNIE F. TRIMBLE,
By GEO. McKAY, *Their Atty.*

GEO. McKAY,
Attorney for Appellants.

450 Arcade Bldg. City. Telephone Main 524.

(Back:)

Filed. No. 40856.

Notice of Appeal of William P. Trimble and wife. L. I. D. = 1117. Filed July 5, 1910.

WM. J. BOTHWELL,
City Comptroller and ex-Officio City Clerk.
By A. E. ASHCRAFT, *Deputy.*

60 STATE OF WASHINGTON,
County of King, City of Seattle, ss:

I, Wm. J. Bothwell, city comptroller and ex-officio city clerk of the City of Seattle, do hereby certify that the within and foregoing are true and correct copies of the council proceedings, Resolution No. 13, Ordinances Numbers 15463 and 21849, Abstract of Assessment Roll in accordance with stipulation, Resolution No. 2780, Notice of Reassessment Roll and affidavit of publication thereof, File No. 40771, Ordinance No. 24198, and File No. 40856, all pertaining to the improvement of Sixth Avenue South et al, under Ordinance No. 15463, creating Local Improvement District No. 1417, as the same appear on file and of record in my office.

In testimony whereof I have hereunto set my hand and affixed hereto the seal of the city of Seattle this 13th day of July, A. D. 1910.

[SEAL.] WM. J. BOTHWELL,
City Comptroller and ex-Officio City Clerk of the City of Seattle,
By E. M. STREET, *Deputy Clerk*.

Cost of transcript $17.30.

61 Fidelity and Deposit Company of Maryland.

Home Office: Baltimore, Maryland.

In the Superior Court of the State of Washington in and for King County.

No. —.

In the Matter of the Reassessment for the Improvement of Sixth Avenue South, and Other Streets under Ordinance No. 15463, Comprising Improvement District No. 1417. Appeal of William P. Trimble and Cannie F. Trimble from the said Reassessment.

Bond for Costs on Appeal.

Know all Men by These presents: that We, William P. Trimble and Cannie F. Trimble, his wife, the appellants above named, as principal, and the Fidelity and Deposit Company of Maryland, a corporation organized under the laws of the state of Maryland, and authorized to transact the business of surety in the state of Washington, as surety, are held and firmly bound unto the city of Seattle, the appellee above named in the just and full sum of three hundred dollars ($300.00) for which sum, well and truly to be paid we bind ourselves, our and each of our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 6th day of July, 1910.

The condition of this obligation is such, that whereas, the above named appellee, on the 27th day of June, A. D. 1910, in the above entitled matter affirmed the above mentioned reassessment.

And whereas, the above named principals have heretofore given due and proper notice that they appeal from said reassessment to said superior court.

62 Now, therefore, if the said principals shall pay to the said obligee, all costs that may be awarded against them on the appeal, or on the dismissal thereof, not exceeding the sum of three hundred dollars ($300.00), then this obligation to be void; otherwise to remain in full force and effect.

WILLIAM P. TRIMBLE. [L. S.]
CANNIE L. TRIMBLE. [SEAL.]
[SEAL.] FIDELITY & DEPOSIT COMPANY OF MARYLAND.
By WALTER C. McKAY, *Attorney in Fact.*

Attest:
A. W. WHALLEY, *Agent.*

Approved as to penalty and surety.
Dated July 15th, 1910.

R. B. ALBERTSON, *Judge.*

Filed Jul- 15, 1910.
D. K. SICKELS, *Clerk.*

63 In the Superior Court of the State of Washington in and for the County of King.

No. 74817.

WILLIAM P. TRIMBLE and CANNIE F. TRIMBLE, His Wife, Appellants,
vs.
THE CITY OF SEATTLE, Respondents.

Appeal from Reassessment for the Improvement of Sixth Avenue South and Other Streets under Ordinance No. 15463, Comprising Improvement District No. 1417.

Findings of Fact and Conclusions of Law.

This cause having heretofore come on duly and regularly for hearing before the above entitled court, Honorable John F. Main presiding, on the 29th day of August, 1910, upon appeal of William P. Trimble and Cannie F. Trimble, his wife, appellants herein, from the order of the city council approving and confirming the reassessment roll to Local Improvement District No. 1417 of the City of Seattle in so far as the same affects the property involved in said appeal, and the testimony of said matter and all the evidence having been submitted to this court, and after argument by counsel for said appellants and by counsel for respondent, the City of Seattle, the court being fully advised in the premises, makes the following findings of fact:

Findings of Fact.

I.

That at all times herein mentioned, the City of Seattle was, and now is a municipal corporation of the first class, organized and existing under and by virtue of the laws of the state of Washington.

64

II.

That at all times herein mentioned William P. Trimble and Connie F. Trimble have been, and now are husband and wife.

III.

That appellants are the owners in fee of the following first class tide lands, to-wit:

West 120 ft., lot 1, Block 256, Seattle Tide Lands.
" 120 ft., lot 2, block 256, " " "
" 120 ft., lot 3, block 256, " " "
" 120 ft., lot 4, block 256, " " "

Lot 4, Block 263 (except the north 63.29 feet thereof) Seattle Tide Lands.

IV.

That the state of Washington is now and since its admission into the Union as a state has been the owner in fee of the following described first class tide lands, to-wit:

East 120 ft., lot 23, Block 271, Seattle Tide Lands.
" 120 " 24, " 271, " " "
" 120 " 25, " 271, " " "
" 120 " 26, " 271, " " "
" 120 " 27, " 271, " " "
" 120 " 28, " 271, " " "
" 120 " 29, " 271, " " "
" 120 " 12, " 272, " " "
" 120 " 13, " 272, " " "
" 120 " 14, " 272, " " "
" 120 " 15, " 272, " " "
" 120 " 16, " 272, " " "
" 120 " 17, " 272, " " "
" 120 " 18, " 272, " " "
" 120 " 19, " 272, " " "
" 120 " 20, " 272, " " "
" 120 " 21, " 272, " " "
" 120 " 22, " 272, " " "

65 That at the date of the several leases hereinafter mentioned the state of Washington in conformity with the statutes of the state, made, executed and delivered three leases covering said

tide lands, two of said leases to William P. Trimble, one of the plaintiffs herein, the other to James D. Hoge, which said several leases are in words and figures as follows:

"This Lease, Made and entered into this 1st day of Nov., A. D. 1899, by and between the State of Washington, party of the first part, and Wm. P. Trimble of Seattle, Wash., party of the second part:

Witnesseth, That for and in consideration of the sum of seventy-nine and no 100 ($79.00) dollars per year, to be paid to the commissioner of public lands of the state of Washington yearly in advance and in consideration of the covenants hereinafter contained, the state of Washington doth lease, demise and let unto the party of the second part that tract or parcel of tide land of the first class, situate in King county, state of Washington, and described as follows, to-wit:

Beg. at the S. W. Corner of lot 6, Blk. 271, Seattle Tide Lands, thence north, 40 ft., thence East 510 ft., thence north 80 ft., thence east 150 ft., thence south 120 ft., thence west 660 ft., to the point of beginning, the same being 0.5367 of lot, 6, 0.8182 of lot 24 and 0.4545 of lot 25, Blk. 271; Also, all of lots 12 to 22 inclusive, Blk 272, Seattle Tide Lands as shown on the official plat thereof filed in the office of the board of state land commissioner at Olympia, Washington, for the period of thirty (30) years from the date of this instrument.

As a further consideration, the following covenants are mutually agreed to:

The payment of the above mentioned annual rent to the commissioner of public lands of the state of Washington yearly
66 in advance is of the essence of this contract, and the same shall be, and is, a condition precedent to the execution and continuance of this lease or any rights thereunder, and if said annual rent shall not be paid within sixty days from date due upon notice served by the commissioner of public lands, this lease shall be null and void.

The state of Washington reserves the right to approve any assignment of the whole or an undivided interest in and to the within leasehold.

The tide lands herein shall not be offered for sale except upon application of lessee, who shall have preference right to release or to purchase at highest rate bid; Provided, however, and these rights are conditioned that lessee shall keep his lease in good standing.

All improvements placed upon said land by the lessee, capable of removal without damage to the land, where the lease is yielded to the state prior to any application to purchase said land, may be removed by the lessee or at his option may remain on the land subject to purchase or hire, and this lease is granted according to the provisions of an act relating to lease, etc., of state lands, approved March 16, 1897 (as amended by section 50, approved March 13, 1899).

All piling or other improvements placed upon the above described tide lands shall attach to and become a part of the realty unless moved or sold under the provision of the said act relating to lease, etc., of state lands, approved March 16, 1897, within three years after termination by surrender or limitation of lease or re-lease.

No statutory right vested in lessee is waived hereby, and lessee expressly agrees to all covenants herein, and binds himself or themselves for the payment of rent as hereinbefore set up.

67 This day and year above written.

THE STATE OF WASHINGTON,
By ROBERT BRIDGES,
Commissioner of Public Lands.

[SEAL.] WM. P. TRIMBLE, *Lessee.*

P. O. Address: Seattle, County of King, State of Wash.

Witnesses as to Lessee.
G. E. DE STEIGUER.
R. R. GEORGE.

"This lease, made and entered into this 1st day of September, A. D. 1903, by and between the state of Washington, party of the first part, and William P. Trimble of Seattle, Wash., party of the second part;

Witnesseth, That for and in consideration of the sum of nineteen and 08 100 ($19.08) Dollars per year, to be paid to the commissioner of public lands of the state of Washington yearly in advance and in consideration of the covenants hereinafter contained, the state of Washington doth lease, demise and let unto the party of the second part that tract or parcel of tide land of the first class, situate in King county, state of Washington, and described as follows, to-wit;

Lots 26, 27, 28, and 29, block 271, as shown on the official map of Seattle Tide Lands on file in the office of the commissioner of public lands at Olympia, Washington, for the period of thirty (30) years from November 1, 1899.

As a further consideration, the following covenants are mutually agreed to:

68 The payment of the above mentioned annual rent to the commission of public lands of the state of Washington yearly in advance is of the essence of this contract, and the same shall be, and is, a condition precedent to the execution and continuance of this lease or any rights thereunder, and if said annual rent shall not be paid within sixty days from date due upon notice served by the commissioner of public lands, this lease shall be null and void.

The state of Washington reserves the right to approve any assignment of the whole or an undivided interest in and to the within leasehold, and also reserves the right to and may cancel the said lease if the said land or any part thereof is used for the propagation or cultivation of oysters.

The tide lands herein shall not be offered for sale except upon application of lessee, who shall have preference right to release at highest rate bid; Provided, however, and these rights are conditioned that lessee shall keep his lease in good standing.

All improvements placed upon said land by the lessee, capable of removal without damage to the land, where the lease is yielded to the state prior to any application to purchase said land, may be removed by the lessee or at his option may remain on the land subject to purchase or hire, and this lease is granted according to the provisions of an act relating to lease, etc., of state lands, approved March 16, 1897 (as amended by section 50, approved March 13, 1899).

All piling or other improvements placed upon the above described tide lands shall attach to and become a part of the realty unless moved or sold under the provision of the said act relating to lease, etc., of state lands, approved March 16, 1897, within three years after termination by surrender or limitation of lease or release.

69 No statutory right vested in lessee is waived hereby, and lessee expressly agrees to all covenants herein, and binds himself or themselves for the payment of rent as hereinbefore set up.

This day and year above written.

THE STATE OF WASHINGTON,
By JOHN L. MURRAY,
Ass't Commissioner of Public Lands.
WILLIAM P. TRIMBLE, *Lessee*,
P. O. Address, Seattle, County of King, State of Wn.

Witness as to Lessee:
——— ———.
——— ———.
[SEAL.]

"This Lease, Made and entered into this 1st day of September, A. D. 1903 by — between the state of Washington, party of the first part, and James D. Hoge, Jr., of Seattle, Wash., party of the second part:

Witnesseth, That for and in consideration of the sum of twenty-eight and 62/100 ($28.62) dollars per year, to be paid to the commissioner of public lands of the state of Washington yearly in advance and in consideration of the covenants hereinafter contained, the state of Washington doth lease, demise and let unto the party of the second part that tract or parcel of tide land of the first class, situate in King county, state of Washington, and described as follows, to-wit:

Lots 19, 20, 21, 22, and 23, block 271, as shown on the official map of Seattle Tide Lands on file in the office of the commissioner of Public Lands at Olympia, Washington, for the period of thirty (30) years from November 1, 1899.

As a further consideration, the following covenants are mutually agreed to:

70 The payment of the above mentioned annual rent to the commissioner of public lands of the state of Washington yearly in advance is of the essence of this contract, and the same shall be, and is, a condition precedent to the execution and continuance of this lease or any rights thereunder, and if said annual rent shall not be paid within sixty days from date due upon notice served by the commissioner of public lands, this lease shall be null and void.

The state of Washington reserves the right to approve any assignment of the whole or an undivided interest in and to the within leasehold, and also reserves the right to and may cancel the said lease if the said land or any part thereof is used for the propagation or cultivation of oysters.

The tide lands herein shall not be offered for sale except upon application of lessee, who shall have preference right to re-lease at highest rate bid: Provided, however, and these rights are conditioned that lessee shall keep his lease in good standing.

All improvements placed upon said land by the lessee capable of removal without damage to the land, where the lease is yielded to the state prior to any application to purchase said land may be removed by the lessee or at his option may remain on the land subject to purchase or hire, and this lease is granted according to the provisions of an act relating to lease, etc., of state lands, approved March 16, 1907, (as amended by section 50, approved March 13, 1899).

All piling or other improvements placed upon the above described tide lands shall attach to and become a part of the realty unless moved or sold under the provision of the said act relating to lease, etc., of state lands, approved March 16, 1897, within three years after termination by surrender or limitation of lease or re-lease.

No statutory right vested in lessee is waived hereby, and lessee expressly agrees to all covenants herein, and binds him-
71 self or themselves for the payment of rent as hereinbefore set up.

This day and year above written.

THE STATE OF WASHINGTON,
By JOHN L. MURRAY,
JAMES D. HOGE, JR., *Lessee,*
Ass't Commissioner of Public Lands.
JAMES D. HOGE, JR., *Lessee.*
P. O. Address, Seattle, County of King, State of Wn.

Witnesses as to Lessee.
——— ———.
——— ———.

[SEAL.]

That on the 12th day of April, 1904, the said James D. Hoge, Jr., lessee named in the last mentioned lease, assigned the said lease to said William P. Trimble, which assignment is in writing and is in words and figures as follows:

Assignment.

(The Commissioner of Public Lands will not approve and enter any assignment unless lease be in good standing.)

STATE OF WASHINGTON,
County of King, ss:

For and in consideration of one ($1.00) dollar in hand paid to the within lessee and assignor, he hereby assigns, sets over and transfers all of his right, title and interest in and to the within and foregoing lease, unto W. P. Trimble, of Seattle, King Co. Wash., and said assignee hereby binds and obligates himself to perform all the conditions and covenants of said lease.

In witness whereof, we have hereunto set our hands and seals this 12th day of April, A. D. 1904.

72 JAMES D. HOGE, JR., *Assignor*. [SEAL.]
WM. P. TRIMBLE, *Assignee*. [SEAL.]

Witnesses:
GEORGE B. KITTINGER,
VIRGINIA HALL,
Witness as to Wm. P. Trimble.

That the said assignment was approved by the commissioner of public lands of the state of Washington in writing and endorsed on the said instrument and is in words and figures as follows:

"State of Washington, Office of Commissioner of Public Lands. Approved April 25, 1904.

JOHN L. MURRAY,
Ass't Commissioner of Public Lands.

V.

That subsequent to the said leases, under Ordinance No. 15463, creating Local Improvement District No. 1117, the City of Seattle provided for the improvement of Sixth avenue South, from Seattle Boulevard at Charles Street to its intersection with Charlestown street; thence easterly along Charlestown street to Eighth avenue south, all in the City of Seattle, by constructing a plank roadway thirty (30) feet in width and wooden sidewalks six (6) feet in width along one side thereof, and providing for the payment of said improvement by special assessments against the property benefited thereby in the manner provided by law, the charter and ordinances of the city of Seattle relating thereto, under the "immediate Payment" plan. All the property described in paragraphs III and IV of these findings of fact lies within the limits of said local improvement district, and abuts upon, and is adjacent or proximate to that portion of Sixth avenue south so improved. That said improvement was actually made in accordance with plans and specifications therefor prepared by the city engineer and approved by the board of public
73 works of the city of Seattle, and completed according to said plans and specifications and the provisions of said ordinance

No. 15463. An assessment roll was duly prepared levying and assessing property in said local improvement districts specially benefited by said improvement to pay the cost and expense thereof, which assessment and assessment roll were after hearing duly approved by ordinance No. 16981 of said city and thereupon certified to the treasurer of said city for collection as provided by law. That no portion of the assessment levied against the property described in paragraphs III and IV of these findings of fact has ever been paid.

VI.

That in accordance with the plans and specifications for said improvement, that portion of the said planked roadway and sidewalk upon said Sixth Avenue South was and is located fifteen (15) feet on either side of the center line of said street, leaving on either side of said improvement and between the margins thereof and the margins of said street a space thirty-five (35) feet in width, unimproved; that said plans and specifications did not provide for and no approaches were constructed from said roadway and sidewalk to the property of these plaintiffs, or to any other property in said local improvement district. That the said tide lands lots owned in fee by plaintiffs and those held by them under leases from the state of Washington, and all that portion of said street upon which the same abut are located on the tide flats, covered in low tide to a depth of about 4 feet, and in high tide covered with water to a depth of about 10 feet; that all the lots held in fee or under lease by plaintiffs have been and still are vacant and unimproved; that prior to the construction of said plank roadway and sidewalk all the lots abutting upon that portion of said Sixth avenue south
71 so improved were vacant and inaccessible except by row boats in high tide; that since said improvement was made and completed a number of factories and other business structures have been erected upon property abutting upon said Sixth Avenue South, and such property has constantly been occupied and in use since such time. That in each such case approaches have been constructed from said planked roadway and sidewalk to said property lines in accordance with the charter of said city and ordinance No. 16081 of said city.

VII.

That by virtue of certain decisions of the courts of this state, certain assessments upon said assessment roll were void and their enforcement was refused by the courts of this state.

VIII.

That it was stipulated in open court by and between the parties hereto by their attorneys of record, that this court, and any appellate court may take judicial notice of the following ordinances as the same appear in the published code of the Charter and Ordinances of the City of Seattle, as follows:

Ordinance No. 16081, entitled:

"An Ordinance regulating the use and occupation of and the conduct of persons in or upon streets, avenues, ways, boulevards, drives, places, alleys, sidewalks, parking strips, squares, triangles, comfort stations, school grounds, play grounds, recreation grounds, parks, park ways, park boulevards, park drives, park paths, and public places and wharves, station grounds and rights of way open to the use of the public, and the space above or beneath the surface of the same, and providing for the control of the same, and for the safety, comfort and convenience of the public in the use of the same and providing penalties for violation thereof."

Approved May 31, 1907.

75 Ordinance No. 16507, entitled:

"An Ordinance providing for the making of local improvements within the city of Seattle, and the manner in which special assessments therefor may be made and collected on property specially benefited thereby, and the modes of paying for the same." Approved July 15, 1907.

IX.

That thereafter the City of Seattle, by Ordinance No. 21849 and general ordinance No. 16507, provided for a new assessment or re-assessment to pay the cost and expense of said improvement, which new assessment or re-assessment, after proper proceedings, was approved by Ordinance No. 24198. That all formal steps and proceedings upon such re-assessments, including the notice of time and place of hearing objections to such re-assessment roll were had as provided by law. That within the time fixed for protesting against such re-assessment roll, appellants filed their objections to certain assessments appearing thereon; such objections were, by the city council, at the time and place fixed for hearing thereof, overruled.

X.

That the property described in paragraph III hereof is subject to assessment for said improvement and is specially benefited by said improvement in an amount in excess of the sum assessed against the same upon such re-assessment roll, and said property is assessed proportionately to other property throughout said local improvement district.

XI.

That the said several parcels of land involved herein were assessed and charged on the said original assessment roll with
76 the sums hereinafter set forth; and that the following is a copy of said original assessments and said original assessment roll (omitting the caption and the certificates at the end of said roll) so far as the said roll relates to the property owned in fee by the plaintiffs, and, also, to the property held under lease, as aforesaid by plaintiffs:

Name.	Lot.	Blk.	Addition.	Assessed.
W. P. Trimble, W. 120 ft. of..	1	256	Seattle Tide Lands	$361.20
" " ..	2	256	"	252.00
" " ..	3	256	"	252.00
" " ..	4	256	"	252.00
" Exc. N. 63.29 ft. of.....	4	263	"	111.00
State of Washington leased to				
W. P. Trimble, E. 120 ft. of..	23	271	"	252.00
" " ..	24	271	"	252.00
" " ..	25	271	"	252.00
" " ..	26	271	"	252.00
" " ..	27	271	"	252.00
" " ..	28	271	"	252.00
" " ..	29	271	"	210.00
" " ..	12	272	"	252.00
" " ..	13	272	"	252.00
" " ..	14	272	"	252.00
" " ..	15	272	"	252.00
" " ..	16	272	"	252.00
" " ..	17	272		252.00
" " ..	18	272	"	252.00
" " ..	19	272	"	252.00
" " ..	20	272	"	252.00
" " ..	21	272	"	252.00
" " ..	22	272	"	361.20

77 That upon the new assessment or re-assessment roll, the property owned in fee by plaintiffs was assessed in the identical principal sums appearing upon said original assessment roll; and that upon said new assessment or re-assessment roll the said leasehold interests were separately charged with eighty-five per cent (85%) and the interests of the state of Washington were separately charged with fifteen per cent (15%) of the original principal assessments levied and charged against the parcels of land so leased as aforesaid; that the following is a copy of said new assessment or re-assessment roll (omitting the caption and the certificates at the end of said roll) so far as said roll relates to property owned in fee by plaintiffs, and, also, to the property held under lease by plaintiffs, as aforesaid:

Name.	Lot.	Blk.	Addition.	Assessed.
W. P. Trimble, W. 120 of....	1	256	Seattle Tide Lands	361.20
" "	2	256	"	252.00
" "	3	256	"	252.00
" "	4	256	"	252.00
" Exc. N. 63.29.	4	263	"	111.00
State of Washington, Fee Simple Interest in following:				
E. 120 ft. of.....	23	271	"	37.80

Name.	Lot.	Blk.	Addition.	Assessed.
W. P. Trimble, Leasehold Interest in following:				
E. 120 ft. of	23	271	"	214.20
State of Washington, Fee Simple Interest in following:				
E. 120 ft. of	24	271	"	37.80
W. P. Trimble, Leasehold Interest in following:				
E. 120 ft. of	24	271	"	214.20
State of Washington, Fee Simple Interest in following:				
E. 120 ft. of	25	271	"	37.80
W. P. Trimble, Leasehold Interest in following:				
E. 120 ft. of	25	271	"	214.20
78				
State of Washington, Fee Simple Interest in following:				
E. 120 ft. of	26	271	Seattle Tide Lands	37.80
W. P. Trimble, Leasehold Interest in following:				
E. 120 ft. of	26	271	"	214.20
State of Washington, Fee Simple Interest in following:				
E. 120 ft. of	27	271	Seattle Tide Lands	37.80
W. P. Trimble, Leasehold Interest in following:				
E. 120 ft. of	27	271	"	214.20
State of Washington, Fee Simple Interest in following:				
E. 120 ft. of	28	271	"	37.80
W. P. Trimble, Leasehold Interest in following:				
E. 120 ft. of	28	271	"	214.80
State of Washington, Fee Simple Interest in following:				
E. 120 ft. of	29	271	"	31.50
W. P. Trimble, Leasehold Interest in following:				
E. 120 ft. of	29	271	"	178.50
State of Washington, Fee Simple Interest in following:				
E. 120 ft. of	12	272	"	37.80
W. P. Trimble, Leasehold Interest in following:				
E. 120 ft. of	12	272	"	214.20
State of Washington, Fee Simple Interest in following:				
E. 120 ft. of	13	272	"	37.80

Name.	Lot.	Blk.	Addition.	Assessed.
W. P. Trimble, Leasehold Interest in following:				
E. 120 ft. of	13	272	"	214.20
State of Washington, Fee Simple Interest in following:				
E. 120 ft. of	14	272	"	37.80
W. P. Trimble, Leasehold Interest in following:				
E. 120 ft. of	14	272	"	214.20
State of Washington, Fee Simple Interest in following:				
E. 120 ft. of	15	272	"	37.80
W. P. Trimble, Leasehold Interest in following:				
E. 120 ft. of	15	272	"	214.20
79				
State of Washington, Fee Simple Interest in following:				
E. 120 ft. of	16	272	Seattle Tide Lands	37.80
W. P. Trimble, Leasehold Interest in following:				
E. 120 ft. of	16	272	"	214.20
State of Washington, Fee Simple Interest in following:				
E. 120 ft. of	17	272	"	37.80
W. P. Trimble, Leasehold Interest in following:				
E. 120 ft. of	17	272	"	214.20
State of Washington, Fee Simple Interest in following:				
E. 120 ft. of	18	272	"	37.80
W. P. Trimble, Leasehold Interest in following:				
E. 120 ft. of	18	272	"	214.20
State of Washington, Fee Simple Interest in following:				
E. 120 ft. of	19	272	"	37.80
W. P. Trimble, Leasehold Interest in following:				
E. 120 ft. of	19	272	"	214.20
State of Washington, Fee Simple Interest in following:				
E. 120 ft. of	20	272	"	37.80
W. P. Trimble, Leasehold Interest in following:				
E. 120 ft. of	20	272	"	214.20
State of Washington, Fee Simple Interest in following:				
E. 120 ft. of	21	272	"	37.80

Name.	Lot.	Blk.	Addition.	Assessed.
W. P. Trimble, Leasehold Interest in following:				
E. 120 ft. of.....	21	272	"	214.20
State of Washington, Fee Simple Interest in following:				
E. 120 ft. of.....	22	272	"	54.18
W. P. Trimble, Leasehold Interest in following:				
E. 120 ft. of.....	22	272	"	307.02

80 XII.

That the said leasehold interests of plaintiffs in and to the property described in paragraph IV herein are assessable for said improvement and are specially benefited by said improvement in an amount in excess of the sum assessed against each such separate leasehold interest by reason of such improvement, and are assessed upon such new assessment or re-assessment roll proportionately with other property throughout said local improvement district; and proportionately with the interest of the state of Washington in said leased lands.

XIII.

That the life of the planking improvement provided for under Ordinance No. 15463 will not exceed twelve (12) years from the completion thereof, to-wit; twelve (12) years from the 29th day of February, 1908.

XIV.

That the city of Seattle, its officers and agents had full and lawful authority to make such new assessment or re-assessment, and each and all of the steps taken thereunder by the city of Seattle, its officers and agents, are regular, valid and lawful and each and every objection of appellants should be overruled.

Done in open court this 19th day of January, 1911.

JOHN F. MAIN, *Judge*.

Whereupon the court makes the following:

Conclusions of Law.

I.

That the leasehold interest of appellants in and to the tide land lots owned by the state of Washington, specified and described in paragraph IV of the above finding of fact, is assessable for
81 the improvement provided for in Ordinance No. 15463, and the new assessment or reassessment provided for in Ordinance No. 21849 of the City of Seattle, and proceedings thereunder had.

II.

That the said assessments appearing upon said new assessment or re-assessment roll do not impair the obligations express or implied of the state's contract contained in the said leases, nor do the statutes and ordinances authorizing such assessments impair any such obligation.

III.

That neither the said assessments appearing upon the new assessment or re-assessment roll, nor the statutes and ordinances authorizing the same, take plaintiffs' property without due process of law, or deny to them the equal protection of the laws.

IV.

That the city of Seattle, and its officers and agents had full and lawful authority to make such new assessment or re-assessment, and each and all of the steps taken thereunder by said city, its officers and agents are regular, valid and lawful.

V.

That each and every new assessment or re-assessment involved in this appeal, including those upon the leasehold interests of appellants in and to the tide lands owned by the state of Washington specified in said paragraph IV of the findings of fact, is valid and subsisting lien against the property or interest assessed upon such new assessment or re-assessment roll.

VI.

That each and every objection of appellants, and each of them to said re-assessment, be overruled.

82

VII.

That the city of Seattle is entitled to a decree confirming and approving said re-assessment roll, and each and every part thereof.

Done in open court this 10th day of January, 1911.

JOHN F. MAIN, *Judge*.

Filed Jan. 10, 1911.

D. K. SICKELS, *Clerk*.

83 In the Superior Court of the State of Washington for King County.

No. 74817.

WILLIAM P. TRIMBLE and CONNIE F. TRIMBLE, His Wife, Plaintiffs,
vs.
THE CITY OF SEATTLE, Defendant.

Exceptions by Plaintiffs to Findings and Conclusions.

The plaintiffs before judgment take the following exceptions to the findings of fact and conclusions of law signed by the court in this action.

I.

The plaintiffs except to the words "are assessable for said improvement," in the second and third line of the 12th finding of fact, for the reason that the same is not a finding of fact, but a conclusion of law and as a conclusion of law is not supported by the facts found.

II.

The plaintiffs except to the 14th finding of fact for the reason that the same is not a finding of fact, but a conclusion of law, and as a conclusion of law, is not supported by the facts found.

III.

The plaintiffs except to the 1st conclusion of law and each and every part thereof; and to the 2nd conclusion of law and each and every part*h* thereof; and to the 3rd conclusion of law and each and every part thereof; and to the 4th conclusion of law and each and every part thereof; and to the 5th conclusion of law and each and every part thereof; and to the 6th conclusion of law and each and every part thereof; and to the 7th conclusion of law and each
84 and every part thereof.

GEO. W. McKAY,
Attorney for Plaintiffs.

The foregoing exceptions are allowed and ordered made a part of the record herein.

Done in open court this 10th day of January, 1911.

JOHN F. MAIN, *Judge.*

Filed Jan. 10, 1911.
D. K. SICKELS, *Clerk.*

85 In the Superior Court of the State of Washington in and for the County of King.

No. 74817.

WILLIAM P. TRIMBLE and CANNIE F. TRIMBLE, His Wife, Appellants,
vs.
THE CITY OF SEATTLE, Respondent.

Appeal from Re-assessment for the Improvement of Sixth Avenue South and Other Streets under Ordinance No. 15463, Local Improvement District No. 1417.

Judgment.

This matter coming on, on motion of respondent, the City of Seattle, by its attorneys Scott Calhoun and Howard A. Hanson, for a judgment upon the findings of fact and conclusions of law heretofore made and entered, confirming and approving the re-assessment in Local Improvement District No. 1417, overruling each and all of the objections of appellants thereto; appellants being represented by George McKay, Esq., their attorney, and the court being fully advised in the premises, it is hereby

Ordered, Adjudged, and Decreed that each and every objection of appellants, and each of them, to the re-assessment and the re-assessment roll in Local Improvement District No. 1417 of the City of Seattle, as the same was provided for by Ordinance No. 21849 of the City of Seattle, and confirmed by Ordinance No. 24498 of the City of Seattle, be and the same is hereby overruled; and it is further

Ordered, Adjudged and Decreed that said re-assessment and re-assessment roll, as the same now stands, be, and the same is
86 hereby in all things confirmed and approved; and each and every such re-assessment is hereby declared to be a valid and subsisting lien against the property or interest against which the same is assessed, and the treasurer of the City of Seattle is hereby directed to proceed with the collection thereof in the manner provided by law.

Done in open court this 11th day of January, 1911.

JOHN F. MAIN, *Judge.*

Filed Jan. 11, 1911.
D. K. SICKELS, *Clerk.*

87 In the Superior Court of the State of Washington for King County.

No. 74817.

WILLIAM P. TRIMBLE and CANNIE F. TRIMBLE, His Wife, Plaintiffs,
vs.
THE CITY OF SEATTLE, Defendant.

Notice of Appeal.

To the above-named defendant, and to Scott Calhoun and Howard Hanson, its attorneys:

Take notice that the above-named plaintiffs, feeling themselves aggrieved by the judgment in this action, appeal therefrom, and from each and every part thereof, to the supreme court of the state of Washington.

Dated this 20th day of January, 1911.

GEO. McKAY.

Receipt of a copy hereof admitted this 20th day of January, A. D. 1911.

SCOTT CALHOUN,
HOWARD A. HANSON,
Attorneys for Def't, The City of Seattle.

Filed Jan. 21, 1911.
D. K. SICKELS, *Clerk.*

88 In the Superior Court of the State of Washington in and for King County.

No. 74817.

WILLIAM P. TRIMBLE and CANNIE F. TRIMBLE, His Wife, Plaintiffs,
vs.
THE CITY OF SEATTLE, Defendant.

Bond for Costs on Appeal.

Know all Men by These Presents; That we, William P. Trimble and Cannie F. Trimble the plaintiffs above named, as principal and the Fidelity and Deposit Company of Maryland, a corporation organized under the laws of the state of Maryland, and authorized to transact the business of surety in the state of Washington, as surety, are held and firmly bound unto the City of Seattle the defendant above named in the just and full sum of two hundred dollars ($200.00), for which sum, well and truly to be paid, we bind ourselves, our and each of our heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 21st day of January, 1911.

The condition of this obligation is such, that whereas, the above named defendant on the 11th day of January, A. D. 1911, in the above entitled action and court, recovered judgment against the plaintiffs above named confirming certain assessments.

And whereas, the above named principals have heretofore given due and proper notice that they appeal from said decision and judgment of said superior court to the supreme court of the state of Washington.

Now, therefore, if the said principals the above named
89 plaintiffs shall pay to the city of Seattle the defendant above named, all costs and damages that may be awarded against them on the appeal, or on the dismissal thereof, not exceeding the sum of two hundred dollars ($200.00), then this obligation to be void; otherwise to remain in full force and effect.

WILLIAM P. TRIMBLE. [SEAL.]
CANNIE F. TRIMBLE. [SEAL.]
[SEAL.] FIDELITY & DEPOSIT COMPANY OF MARYLAND,
By JOHN A. WHALLEY,
Attorney in Fact.

Attest:
DANIEL B. TREFETHEN, *Agent.*

Filed Jan. 21, 1911.
D. K. SICKELS, *Clerk.*

90 In the Superior Court of the State of Washington for King County.

No. 74817.

WILLIAM P. TRIMBLE and CANNIE F. TRIMBLE, His Wife, Plaintiffs,
vs.
THE CITY OF SEATTLE, Defendant.

Order as to Transcript.

In this cause on motion of George McKay, Attorney for the plaintiffs, and by consent of counsel for the defendant:

It is ordered, that the original transcript on the appeal from the city counsel to this court, be incorporated into the transcript on appeal from this court to the Supreme Court instead of a copy of such transcript.

Done in open court this 23d day of January, 1911.
JOHN F. MAIN, *Judge.*

O. K.
H. A. HANSON,
Ass't Cor. Counsel.

Filed Jan. 23, 1911. D. K. Sickels, Clerk.

91 STATE OF WASHINGTON,
County of King, ss:

I, D. K. Sickels, county clerk of King County and ex-officio clerk of the superior court of the state of Washington, in and for the county of King, do hereby certify that the foregoing is a full, true and correct transcript of so much of the record and files in Cause No. 74817, William P. Trimble, et ux, vs. The City of Seattle, as I have been directed by appellant to transmit to the supreme court of the state of Washington on appeal.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this 2nd day of February, A. D. 1911.

[SEAL.] D. K. SICKLES, *Clerk.*
By W. K. SICKLES,
Deputy Clerk.

92 No. 9523.

Department Two.

Filed July 11, 1911.

WILLIAM P. TRIMBLE AND WIFE, Appellants,
v.
CITY OF SEATTLE, Respondent.

This is an appeal from a judgment of the superior court of King county, confirming an assessment against certain leasehold interests in first class tide lands. The leases were issued under the acts of 1887 as amended in 1890. They were executed in 1899. In the legislative act of 1905 it was provided that:

"All leasehold, contractual or possessory interests in any tide lands owned by the state of Washington in fee simple (in trust or otherwise), situated within the limits of any incorporated city or town in this state, and which have been leased by the state, or which are held by any person, firm, association, private corporation or municipal corporation under a contract of purchase from the state, may be assessed and charged for the cost of all local improvements specially benefiting such leasehold, contractuary or possessory interest, which may be ordered by the proper authorities of such city or town," etc.

Section 1 of the act of 1907 is as follows:

"Any city of the first class in the state of Washington is hereby authorized and empowered to include within any local improvement district formed by it the whole or any part of any land in school sections or tide lands, title of which remains in the state of Washington, and said city is authorized and empowered to assess the cost of any local improvement against any such tide or school land in the same manner as if the same were private property: Provided, however, That the interest of the state in such property shall not be sold to satisfy the lien of such assessment, but only such interest, or contract, or other right therein as may be in private ownership, shall be subject to such sale."

These laws were in existence at the time the city of Seattle passed an ordinance creating a local improvement district and providing for an assessment to pay the costs and expenses of such improvements within the limits of said districts. The leasehold interests in question, it will be noticed, were executed prior to the passage of this ordinance, and also prior to the passage of the laws just quoted. The findings of the court, among other things, are to the effect that the property described, which property is the subject of this controversy, is subject to assessment for said improvement, and
93 especially benefited by said improvement in an amount in excess of the sum assessed against the same upon such reassessment roll, and said property is assessed proportionately to other property throughout said local improvement district. It is not contended that the proper proceedings relating to the reassessment were not taken by the city of Seattle. Due notice of the hearing upon the reassessment roll was given, as provided by the law and the charter and ordinances of the city of Seattle.

The findings of fact are not contested by the appellants, except as to one or two findings which it is contended by the appellants are more properly conclusions of law than findings of fact. But the principal contention is that, inasmuch as these leasehold interests had been acquired by the appellants prior to the passage of the laws providing for their assessment, which we have quoted above, the appellants' rights must be determined under the rule of the common law that, in the absence of a covenant or condition to the contrary, it is an implied covenant in every lease that the lessor shall pay all taxes and assessments levied on the leased land during the term, and that no statutory provision to the contrary had been passed at the time the leasehold interests were executed. Conceding this to be the established law in relation to private contracts or contracts between private individuals, it seems to us that a distinction must exist between a contract between private individuals, where the property leased or granted or sold is property which is already subject to taxation and where the parties must necessarily enter into the contract having in mind the burden of taxation upon said property, and a contract entered into by a private individual and a sovereignty where the property, by reason of its being the property of the sovereign, was not subject to taxation. It has been the universal announcement by courts and law writers that, inasmuch as taxation is necessary to the existence and perpetuation of government, there will be no implied exemptions from that burden. Chief Justice Marshall, in delivering the opinion of the court in Providence Bank v. Billings, 4 Peters, 514, among other things, said:

94 "That the taxing power is of vital importance; that it is essential to the existence of government; are truths which it cannot be necessary to reaffirm. They are acknowledged and asserted by all. It would seem that the relinquishment of such a power is never to be assumed. We will not say that a state may not relinquish it; that a consideration sufficiently valuable to induce a partial release of it may not exist; but as the whole community is interested in retaining it undiminished; that community has a right to insist

that its abandonment ought not to be presumed, in a case in which the deliberate purpose of the state to abandon it does not appear."

It is conceded that there is no expressed purpose on the part of the state in the contracts under discussion, to relinquish the right to demand the payment of taxes upon the leasehold interest sold by the state. In Wells v. Savannah, 181 U. S. 531, Justice Peckham, speaking for the court said:

"The payment of taxes on account of property otherwise liable to taxation can only be avoided by clear proof of a valid contract of exemption from such payment and the validity of such contract presupposes a consideration therefor. If the property be in its nature taxable the contract exempting it from taxation must, as we have said, be clearly proved. It will not be inferred from facts which do not lead irresistably and necessarily to the existence of the contract. The facts proved must show either a contract express in terms, or else it must be implied from facts which leave no room for doubt that such was the intention of the parties and that a valid consideration existed for the contract. If there be any doubt on these matters, the contract has not been proven and the exemption does not exist."

It would seem that grave doubts would exist if we were to look to the contract only concerning this exemption, and it is not from the contract that the appellants claim the exemption, but from the general rule which obtains in private contracts where as we have seen the contract is with reference to property which is known to be taxable at the time the contract was made.

Appellants rely upon Charles River Bridge v. Warren Bridge, 11 Pet. 420. But that case, construed in connection with the general rule announced by the Supreme Court of the United States in the cases from which we have just quoted and which follow the rule announced by all courts and textwriters, does not sustain appellants' contention, and is not applicable to the circumstances of this case. The learned attorneys for the respondent have expressed so clearly the status of the law of this case, that we take pleasure in incorporating their language in this opinion and adopting it as a part of the opinion of the court. It is said:

95 "There is a clear distinction to be noted between leases between private parties and leases granted by the state in respect to taxes and assessments. In leases between private parties the entire estate is, at the time of the execution of the lease, in private ownership—subject to taxation and assessment. Whether the land is used or not, leased or not, taxes are levied against the entire estate, and in leasing it the question of taxes and assessments against the land as a whole becomes one of the elements necessarily affecting the consideration of the lease. In a lease granted by the public, however, the fee is not taxed, being public property, and the question of taxes does not enter into the consideration. After the state's lease is granted—the leasehold interest passes into the common mass of private property, completely severed from the remaining non-taxable state fee so far as the matter of taxation was concerned—stripped from the remaining fee interest as fully as if the state had sold one of two state tide land lots—the estate sold was public, is now private—was not taxable, is

now taxable, and the question of when and to what extent the taxing power of the state shall be exercised upon the tide land lot sold or the tide land lease sold by the state, in nowise enters into the consideration in the sale of the lot or the sale of the lease. After the tide land lot is sold, it becomes private property and the entire private interest is taxable; after the tide land lease is sold it becomes private property and the entire private interest is taxable. True, it must be taxed as separate entity from the public fee, but it is nevertheless subject to the common burden of taxation."

But outside of general authority, we think this question has been put at rest by the decisions of this court. In Moeller v. Gormley, 44 Wash. 465, it was held that a leasehold interest in tide lands under leases from the state is subject to taxation. While it is true that the case was decided against the contention of the city in that case upon another proposition, nevertheless it was stated by the court in the discussion of the case that two questions were presented, (1) is such leasehold interest taxable and, (2) if taxable, should it be assessed as realty or personal property. Noticing the contention that the leasehold interest was not taxable, we said:

"But we think it cannot, under the general scheme and purpose of taxation, successfully bear the test of practical application. Doubtless a prospective lessee would bid more for a lease if he knew that his leasehold interest would not be taxed. But the same may be said of a prospective purchaser of state lands. He would pay more for the fee if he knew it would remain exempt from taxation. The difference between the two is in degree only, and not in character. But it is the policy of our commonwealth that the fee in any real estate sold by the state shall thenceforth be assessable. As soon as title passes from the state the land becomes private, and no longer public, property. When a lease is given by the state to an individual or private corporation, the lessee thereby obtains for his or its private use certain rights and privileges in, to and upon such real estate. These rights and privileges constitute private property over which the lessee has, and may exercise, absolute dominion and ownership within the limitations of his or its lease. Why, as such property, it should not be subject to the general rule of taxation, we conceive of no reason."

In Rabel v. Seattle, 44 Wash. 482, it was also held that a leasehold interest in state lands was subject to taxation, although it was
96 not subject to an assessment for local improvements made prior to the time of the letting of the land by the state. This announcement of the policy of the state was again indorsed and ratified in Coast Land Company v. Seattle, 52 Wash. 380, where it was said:

"The legislature may authorize the assessment of a leasehold interest for a local improvement in so far as the leasehold interest is benefited by the improvement, and may provide for a sale of the leasehold to satisfy the lien of the assessment; in fact, we have so held in Rabel v. Seattle, 44 Wash. 482."

In that case it was also held that a leasehold interest could not be sold to satisfy an assessment against the entire fee. But the disposition which was made of these cases only went to the method of col-

lecting the assessments, while in each instance they affirmed the doctrine that the leasehold interest was assessable; and believing that the announcement made in those cases is in harmony with the general principles of law in relation to taxation, we indorse what was said therein.

The judgment is affirmed.

DUNBAR, *J.*

We concur:
ELLIS, *J.*
CROW, *J.*
MORRIS, *J.*
CHADWICK, *J.*

97 In the Supreme Court of the State of Washington, August 11, 1911.

No. 9523.

WILLIAM P. TRIMBLE AND WIFE, Appellants,
vs.
CITY OF SEATTLE, Respondent.

Judgment.

This cause having been heretofore submitted to the court upon the transcript of the record of the superior court of King county, and upon the argument of counsel, and the court having fully considered the same and being fully advised in the premises, It is now on this 11th day of August, A. D. 1911, on motion of Scott Calhoun, Esquire, of counsel for respondent, considered, adjudged, and decreed that the judgment of the said superior court be and the same is hereby affirmed with costs; and that the said city of Seattle have and recover of and from the said William P. Trimble and wife and from Fidelity & Deposit Company of Maryland surety, the costs of this action taxed and allowed at thirty-nine & 50/100 dollars, and that execution issue therefor. And it is further ordered that this cause be remitted to the said superior court for further proceedings in accordance herewith.

98 In the Supreme Court of the State of Washington.

No. —.

WILLIAM P. TRIMBLE and CANNIE F. TRIMBLE, His Wife, Plaintiffs and Appellants and Plaintiffs in Error,
vs.
THE CITY OF SEATTLE, Respondent and Defendant in Error.

Petition for Writ of Error and Appeal and Order for Same.

That above named William P. Trimble and Cannie F. Trimble his wife, conceiving themselves aggrieved by the judgment entered on

the 11th day of August, 1911, in the above entitled cause, pray for an order permitting them to prosecute a writ of error and to appeal to the Supreme Court of the United States and also that an order be made fixing the amount of security which they the said William P. Trimble and Cannie F. Trimble, the plaintiffs in error shall give and furnish upon said writ of error, and appeal; and your petitioners will ever pray etc.

Dated this 11th day of August, 1911.

GEO. McKAY,
Attorney for William P. Trimble and Cannie F. Trimble, Plaintiffs in Error.

On reading the foregoing petition and the assignments of error of the said William P. Trimble and Cannie F. Trimble plaintiffs in error and appellants, and after consideration of the same, a writ of error is hereby granted and allowed, and an appeal allowed as prayed for in said petition and the bond on appeal is hereby fixed at the sum of five hundred ($500) dollars.

Done this 11th day of August 1911.

R. O. DUNBAR,
Chief Justice of the Supreme Court of the State of Washington.

Indorsed: Filed Aug. 11, 1911. C. S. Reinhart, Clerk. F.

99 In the Supreme Court of the State of Washington.

No. —.

WILLIAM P. TRIMBLE and CANNIE F. TRIMBLE, His Wife, Plaintiffs and Appellants and Plaintiffs in Error.

vs.

THE CITY OF SEATTLE, Respondent and Defendant in Error.

Assignment of Error.

On this 11th day of August, 1911, the above named William P. Trimble and Cannie F. Trimble, his wife, plaintiffs in error, by Geo. McKay their attorney, for their assignment of error herein, says that, in the record and proceedings in the above entitled cause, upon the hearing and determination thereof in the above entitled court and in the judgment rendered therein, there is manifest error in this, to-wit:

1. That said court erred in rendering judgment affirming the judgment of the superior court of King county, in said state.

2. The said court erred in affirming the judgment of the superior court of King county, in so far as said judgment affirmed the special assessments on the leaseholds of the said plaintiffs in error and appellants.

3. The said court erred in overruling the assignment of error made in said court, which said assignments of error were in words and figures as follows:

I.

"In finding as a matter of fact that the said leasehold interests are assessable for said improvements."

II.

"In making the 14th finding of fact" (which said finding of fact reads as follows:

That the City of Seattle, its officers and agents had full and lawful authority to make such new assessment or reassessment, and each and all of the steps taken thereunder by the City of Seattle, its officers and agents, are regular, valid and lawful, and each and every objection of appellants should be overruled.

III.

"In making the 1st conclusion of law" (which said conclusion reads as follows, to-wit:

That the leasehold interest of appellants in and to the tide land lots owned by the state of Washington, specified and described in Paragraph IV of the above findings of fact, is assessable for the improvement provided for in Ordinance No. 15463, and the new assessment or re-assessment provided for in Ordinance No. 21849 of the city of Seattle, and proceedings thereunder had.)

IV.

"In making the 2nd conclusion of law" (which said conclusion reads as follows:

That the said assessments appearing upon said new assessment or re-assessment roll do not impair the obligations express or implied of the state's contract contained in the said leases, nor do the statutes and ordinances authorizing such assessments impair any such obligation.)

V.

"In making the 3rd conclusion of law" (which said conclusion reads as follows:

That neither the said assessments appearing upon the new assessment or re-assessment roll, nor the statutes and ordinances authorizing the same, take plaintiff's property without due process of law, or deny to them the equal protection of the laws.)

VI.

"In making the 4th conclusion of law" (which said conclusion reads as follows:

That the city of Seattle, and the officers and agents had full and lawful authority to make such new assessments or reassessment, and each and all of the steps taken thereunder by said city its officers and agents are regular, valid and lawful.)

101 VII.

"In making the 5th conclusion of law" (which said conclusion reads as follows:

That each and every new assessment involved in this appeal, including those upon the leasehold interests of appellants in and to the tide lands owned by the state of Washington specified in said Paragraph IV, of the findings of fact, is a valid and subsisting lien against the property or interest assessed upon such new assessment or re-assessment roll.)

VIII.

"In making the 6th conclusion of law" (which said conclusion reads as follows:

That each and every objection of appellants and each of them, to said re-assessment, be overruled.)

IX.

"In making the 7th conclusion of law" (which said conclusion reads as follows:

That the city of Seattle is entitled to a decree confirming and approving said re-assessment roll, and each and every part thereof.)

X.

In rendering the judgment in this action.

Wherefore, the above named plaintiffs in error pray that this their assignments of error be entered *when* the records of this cause, and they further pray that upon the hearing of this appeal (1) that the said judgment be reversed and set aside, and (2) that said judgment be reversed and — aside in so far as it affirms the assessments imposed on the leasehold interests held by the plaintiffs in error and appellants.

Dated this 11th day of August, 1911.

GEO. McKAY,
Attorney for the Plaintiffs in Error and Appellants.

Indorsed: Filed Aug. 11, 1911. C. S. Reinhart, Clerk. F.

102 In the Supreme Court of the State of Washington.

No. —.

WILLIAM P. TRIMBLE and CANNIE F. TRIMBLE, His Wife,
Plaintiffs in Error and Appellants,
vs.
THE CITY OF SEATTLE, Defendant in Error and Respondent.

Bond on Appeal.

Know all Men by These Presents, that we, William P. Trimble and Cannie F. Trimble, the above named plaintiffs in error, and

appellants as principals, and the Fidelity and Deposit Company of Maryland a corporation as surety are held firmly bound unto the city of Seattle the above named defendant in error, and respondent in the penal sum of five hundred ($500) dollars for the payment of which we bind ourselves, our heirs, representatives and assigns, jointly and severally, firmly by these presents.

Sealed with our seal and dated this 8th day of August, 1911.

Whereas, the above bounden principals have sued out a writ of error from the Supreme Court of the United States, to the above name- court to reverse the judgment rendered in said cause by said court, and have appealed from said judgment and decree.

Now, therefore, if the said principals shall prosecute their appeal and writ of error to effect and answer all costs if they shall fail so to do, then this obligation to be void, otherwise to remain in full force and effect.

WILLIAM P. TRIMBLE.
CANNIE F. TRIMPLE.
[SEAL.] FIDELITY AND DEPOSIT COMPANY OF MARYLAND.
By JOHN A. WHALLEY, *Attorney in Fact.*
A. W. WHALLEY, *Agent.*

The foregoing bond is approved by me, as to form, amount and sufficiency of surety this 11th day of August, 1911.

R. O. DUNBAR,
Chief Justice of the Supreme Court of the State of Washington.

Indorsed: Filed Aug. 11, 1911. C. S. Reinhart, Clerk. F.

103 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Supreme Court of the State of Washington, Greeting:

Because, in the record of proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Washington, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in this suit, between William P. Trimble and Cannie F. Trimble, Appellants and plaintiffs in error, and the City of Seattle, respondent and defendant in error, (1) wherein was drawn in question the validity of a statute of (or an authority exercised under) said State, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; and (2) wherein was drawn in question the construction of a clause of the constitution of the United States, and the decision was against the right, title, privilege, or exemption specially set up or claimed under such clause of the said constitution, a manifest error hath happened, to the great damage of the said William P. Trimble and Cannie F. Trimble, plaintiffs in error, as by their complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ,
104 so that you have the same at Washington on the 18th day of September next, in the Supreme Court, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, the 11th day of August, 1911.

[Seal of the United States Circuit Court, Western District of Washington.]

SAML D. BRIDGES,
Clerk of the Circuit Court of the United States
for the Western District of Washington.
By B. O. WRIGHT, *Deputy.*

Allowed by:
R. O. DUNBAR,
Chief Justice of the Supreme Court
of the State of Washington.

105 [Endorsed:] 9523. In the Supreme Court of the United States. William P. Trimble et al., Plaintiffs in Error, vs. City of Seattle, Defendant in error. Writ of Error. Geo. McKay, Attorney for Plaintiffs in Error. Filed Aug. 11, 1911. E. S. Reinhart, Clerk. F.

106 UNITED STATES OF AMERICA, *ss:*

To the City of Seattle, Greeting:

You are hereby cited and admonished to be an appear at the Supreme Court of the United States, to be held in the City of Washington, in the District of Columbia, on the 18th day of September, 1911, pursuant to a writ of error and an appeal on file in the Clerk's office of the Supreme Court of the State of Washington in that certain action wherein William P. Trimble and Cannie F. Trimble are plaintiffs in error and appellants, and you the said City of Seattle, are the defendant in error and respondent, to show cause, if any there be, why the judgment and decree given made and ordered against the said William P. Trimble and Cannie F. Trimble, and in your favor, by the said Supreme Court of the State of Washington, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 11th day of August, 1911.

R. O. DUNBAR,
Chief Justice of the Supreme Court of the State of Washington.

We, the undersigned attorneys for the defendant in error and respondent, the City of Seattle, acknowledge service of the above and foregoing citation, this 11th day of August, 1911.

——— ———,
Attorneys for the City of Seattle.

107 [Endorsed:] 9523. In the Supreme Court of the United States. William P. Trimble et al., Plaintiff in error, vs. City of Seattle, Defendant in error. Citation. Geo. McKay, Attorney for Plaintiff. Filed Aug. 11, 1911. C. S. Reinhart, Clerk. F.

108 In the Supreme Court of the State of Washington.

No. —.

WILLIAM B. TRIMBLE and CANNIE F. TRIMBLE, His Wife, Plaintiffs and Appellants, and Plaintiffs in Error,
vs.
THE CITY OF SEATTLE, Respondent and Defendant in Error.

Admission of Service.

In this cause the respondent and defendant in error The City of Seattle hereby admits service of the writ of error and the citation in this action.

Dated at Seattle, Washington, this 16th day of August, 1911.

SCOTT CALHOUN,
HOWARD C. HANSON,
Attorneys for Respondent and Defendant in Error.

Indorsed: Stipulation. Filed Aug. 30, 1911. F. S. Guyot, Dep. Clerk.

109 In the Supreme Court of the State of Washington.

No. 9523.

WILLIAM P. TRIMBLE and WIFE, Appellants,
vs.
CITY OF SEATTLE, Respondent.

Clerk's Certificate.

I, C. S. Reinhart, Clerk of the Supreme Court of the State of Washington, hereby certify that the above and foregoing is a full,

true, and correct transcript of the record in the above entitled cause as the same now remains on file in my office, together with the original Writ of Error and the original Citation.

In testimony whereof I have hereunto set my hand and affixed the seal of said Supreme Court at Olympia this 25 day of August, 1911.

[Seal of the Supreme Court, State of Washington.]

C. S. REINHART, *Clerk*.

Endorsed on cover: File No. 22,893. Washington Supreme Court. Term No. 817. William P. Trimble and Cannie F. Trimble, plaintiffs in error, vs. The City of Seattle. Filed October 7th, 1911. File No. 22,893.

108 13

(22,893)

IN THE

SUPREME COURT

OF THE UNITED STATES

Office Supreme Court, U.
FILED.
DEC 11 1911
JAMES H. McKENN
CL

OCTOBER TERM, 1911.

No. [redacted].

WILLIAM P. TRIMBLE and CANNIE F. TRIMBLE,

Plaintiffs in Error.

vs.

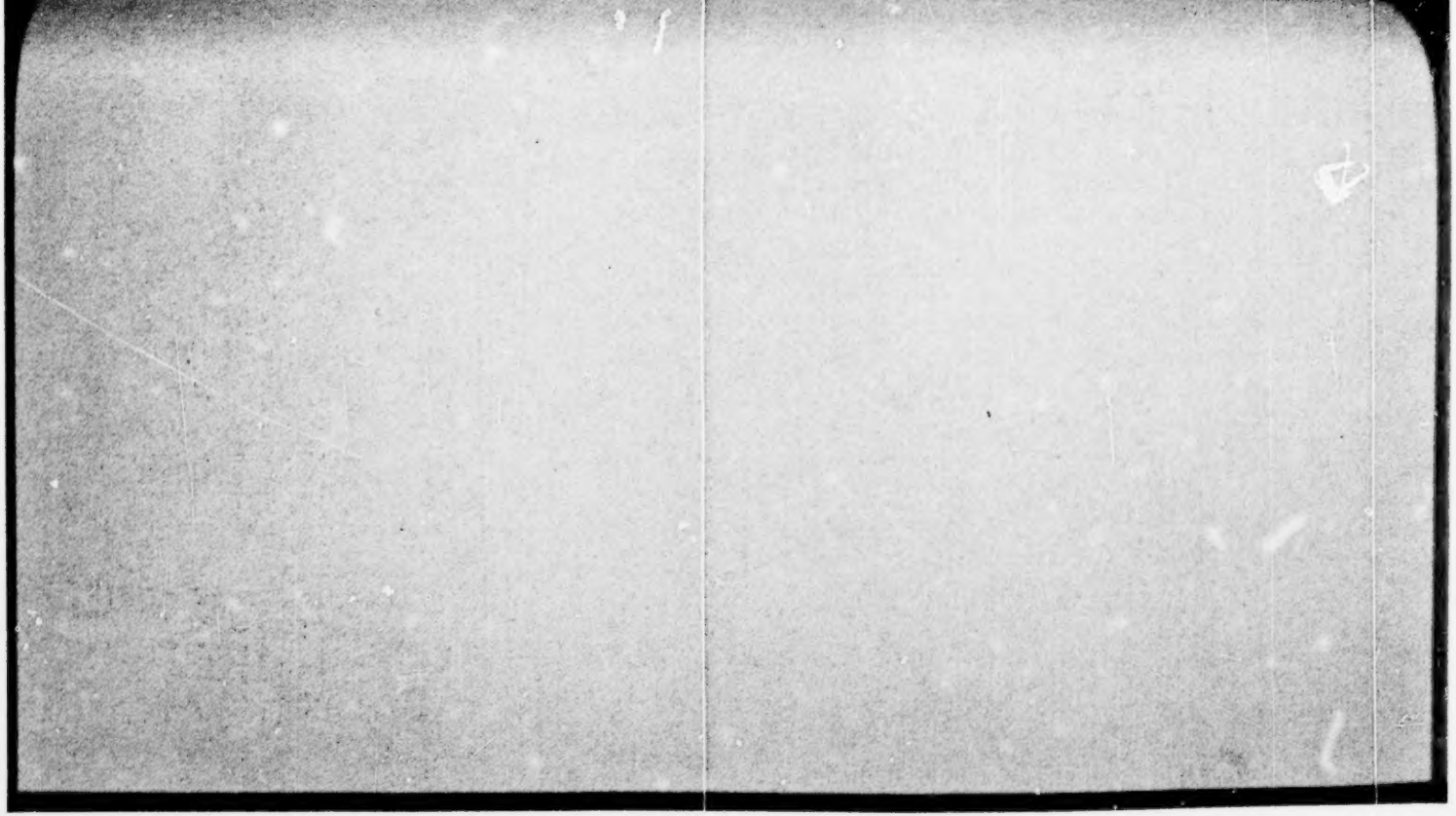
THE CITY OF SEATTLE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

C. W. CORLISS,
Attorney for Appellants and Plaintiffs in Error.

GEO. McKAY,
Of Counsel.

Record Publishing Company, 1810 Westlake Ave., Seattle.



(22,893)

IN THE

SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1911.

No. 817.

WILLIAM P. TRIMBLE and CANNIE F. TRIMBLE,

Plaintiffs in Error.

vs.

THE CITY OF SEATTLE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

C. W. CORLISS,
Attorney for Appellants and Plaintiffs in Error.
GEO. McKAY,
Of Counsel.



STATEMENT OF THE CASE.

The State of Washington is the owner of certain first class tide land. The State leased this land, part of it to William P. Trimble, one of the plaintiffs in error, another part to James D. Hoge, who assigned his lease to Mr. Trimble. Omitting merely formal parts the following is a sample of the form and terms of the leases:

"This lease, Made and entered into this 1st day of Nov. A. D. 1899, by and between the State of Washington, part of the first part, and Wm. P. Trimble, of Seattle, Wash., party of the second part:

"Witnesseth, That for and in consideration of the sum of seventy-nine and no-100 ($79.00) dollars per year, to be paid to the commissioner of public lands of the State of Washington yearly in advance and in consideration of the covenants hereinafter contained, the State of Washington doth lease, demise and let unto the party of the second part that tract or parcel of tide land of the first class situate in King County, State of Washington, and described as follows, to-wit: (Here the land is described.) For the period of thirty (30) years from the date of this instrument.

"As a further consideration, the following covenants are mutually agreed to:

"The payment of the above mentioned annual
66 rent to the commissioner of public lands of the State of Washington yearly in advance is of the essence of this contract, and the same shall be, and is, a condition precedent to the execution and continuance of this lease or any rights thereunder,

and if said annual rent shall not be paid within sixty days from date due upon notice served by the commissioner of public lands, this lease shall be null and void.

"The State of Washington reserves the right to approve any assignment of the whole or an undivided interest in and to the within leasehold.

"The tide lands herein shall not be offered for sale except upon application of leasee, who shall have preference right to release or to purchase at highest rate bid; Provided, however, and these rights are conditioned that lessee shall keep his lease in good standing.

"All improvements placed upon said land by the lessee, capable of removal without damage to the land, where the lease is yielded to the State prior to any application to purchase said land, may be removed by the lessee or at his option may remain on the land subject to purchase or hire, and this lease is granted according to the provisions of an act relating to lease, etc., of state lands, approved March 16, 1897 (as amended by Section 50, approved March 13, 1899).

"All piling or other improvements placed upon the above described tide lands shall attach to and become a part of the realty unless moved or sold under the provision of the said act relating to lease, etc., of state lands, approved March 16, 1897, within three years after termination by surrender or limitation of lease or release.

"No statutory right vested in lessee is waived hereby, and lessee expressly agrees to all covenants herein, and binds himself or themselves for the payment of rent as hereinbefore set up.

"This day and year above written.

"THE STATE OF WASHINGTON,

"(Seal) By ROBERT BRIDGES,

"Commissioner of Public Lands,

"WM. P. TRIMBLE, Lessee."

All the leases are in the same form.

As the Court will notice in passing, the leases contain no provision whatever as to taxes. The leases were issued under the Acts of 1897, as amended in 1899; the Act of 1897, (Laws of 1897, pp. 242-245) provided (Sec. 19, p. 242) "that all school and granted lands of the State of Washington may be leased for a term of five years or less to the highest bidder." The Act provides for the holding of the auction, the issuing of the leases, the record thereof, the method of giving notice of the forfeiture, etc. Sec. 50 ofthis Act (p. 253) provided that "Tide and shore lands * * * * may be leased in the same manner as provided for the lease of arid lands." In 1899 (Laws of 1899, p. 139) this section was so amended that "Tide and shore lands * * * * may be leased in the same manner as provided for the lease of school and granted land: * * * * * *and provided further,* That tide lands may be leased for a period not to exceed thirty years." As the Court can see by a glance at the part of the act relating to school and granted land (Laws of 1897, p. 242-245) the lease contemplated by the act is the ordinary short terms lease (five years), with

no special covenants or provisions, and entirely void of any covenants as to taxes or assessments *on the land,* and there is nothing in the act to suggest that the lessee was to pay any charge levied upon the land; the rent was to be the total income of the State from the land. This statute was by Sec. 50 of the Act of 1899, (Laws of 1899, p. 139) mentioned above extended to the lease of tide lands, with this difference only that a thirty year lease of tide land might be granted, but this longer term was under the same law as the shorter term of five years for granted and school land. The same legislature that passed the original act providing for the leasing of state lands passed a revenue act (Laws of 1897, p. 136), containing a section (Laws of 1897, p. 17g) which reads as follows:

> "When any tax on real estate is paid or collected of any occupant or tenant, or any other person, which, by agreement or otherwise, ought to have been paid by the owner, lessor or other party, such occupant, tenant or other person may recover by action the amount which such owner, lessor or party in interest ought to have paid, with interest thereon at the rate of ten per cent. per annum, or he may retain the same from any rent due or accruing from him to such owner or lessor for real estate on which such tax is so paid; and the same shall, until paid, constitute a lien upon such real estate."

While this section does not in terms enact the rule that in the absence of a covenant or condition to the contrary the lessor must pay all taxes and other charges

upon the leased land, it recognizes the rule, and this act was passed as stated above at the same session which enacted the act providing for leases of State land.

The law, statute and common, under which these leases were issued was, (1) the rule of the common law, that in the absence of a covenant or condition to the contrary the lessor, not the lessee, must pay all taxes and assessments levied on the leased land during the term; (2) the statutes above mentioned which instead of changing, recognized the common law rule just mentioned; (3) the rule that the State the same as an individual is bound by that rule.

The leases are void of any covenant or condition imposing on the lessee the burden of paying any form or kind of charge on the land, and the *land* was free from all charges of every kind, and there was no reservation of the right to impose taxes or assessments on the leased land, and compel the tenant to pay any part thereof, and further, there was no statute or other law, splitting assessments against the *land*, compelling lessees to pay a portion thereof.

After these leases were made the State enacted the Law of 1907, which so far as the mode of making the assessment is concerned, reads as follows:

> "Section 1. Any city of the first class in the State of Washington is hereby authorized and empowered to include within any local improvement dis-

trict formed by it the whole or any part of any land in school sections or tide lands, title of which remains in the State of Washington; and said city is authorized and empowered to assess the cost of any local improvement against any such tide or school land in the same manner as if the same were private property: Provided, however, That the interest of the State in such property shall not be sold to satisfy the lien of such assessment, but only such interest, or contract or other right therein as may be in private ownership shall be subject to such sale."

The other sections of the act relate to the mode of enforcing the payment of the assessment and may be omitted for the present.

The original assessment involved in this action was, according to the express provisions of the act, levied upon the *land*. (See Ordinance No. 15463, Printed Trans. pp. 20 and 21; Finding of Fact No. XI. Printed Trans. pp. 46-50. Ordinance No. 21849, providing for the assessment, recites that "Whereas, certain assessments for such improvement were levied and assessed against such tide lots, "etc. Printed Trans., pp. 21 and 22.)

The Act of 1907 (Law of 1907, pp. 123-124) provided for a sale of the leasehold to pay the assessments levied on the land, and this the Supreme Court of Washington held could not be done. (*Coast Land Co. vs. Seattle*, 52 Wash., 380).

After this decision the city council passed Ordinance No. 21849, (Printed Trans., pp. 21 and 22) which con-

tained the following recitals:

> "Whereas, certain assessments for such improvement were levied and assessed against such tide land lots, which assessments included the assessments against such leasehold interests, respectfully, therein, but such leasehold interests were not assessed as separate entities from the fee in such respective tide land lots owned by the State of Washington."

After the recitals follows the enacting clause of the ordinance directing the reassessment against which complaint is made. This ordinance did not direct just how the reassessment should be made, but on June 27, 1910, the city council passed Ordinance No. 24498, (Printed Trans., pp. 32-34) which approved the re-assessment.

So we have in the form of legislative action authorizing and approving the assessments in question, (1) the Act of 1907, authorizing a levy against the leased land, (Laws of 1907, pp. 123 and 124), (2) Ordinance No. 15463, (Printed Trans., pp. 20 and 21) of the city of Seattle authorizing an assessment against the leased *land*, (3) Ordinance No. 21849 (Printed Trans., pp. 21 and 22) authorizing and directing a re-assessment, and, (4) Ordinance No. 24498, approving the re-assessment of which complaint is made. Ordinance No. 24498 approved the division of the assessment against the land into two sections, one 85% thereof, charged to the leaseholds, and the other, 15% thereof, charged to the remainder in fee.

Notice was given of the reassessment and the plaintiffs filed their objections (Printed Trans., pp. 30-32.) The appellants objected that the statute and ordinances as well as the reassessment were in violation of the Constitution of the United States, for the reasons, (a) that they impaired the obligation of the State to pay the taxes and assessments levied on the leased land; (b) they also took the appellants's property without due process of law and denied to them the equal protection of the laws.

These objections were overruled by the city council (Ordinance No. 24498, Printed Trans., pp. 32-34). An appeal was taken to the Superior Court (Printed Trans., pp. 34-36), where the action of the council was affirmed, and from that judgment an appeal was prosecuted to the Supreme Court of the State, which affirmed the decision of the Superior Court. This appeal is from the decision of the Supreme Court of the State.

QUESTIONS INVOLVED.

The questions of law involved in this appeal are as follows:

1. Does the rule that the lessor, in the absence of a covenant or condition to the contrary, is bound to pay all taxes and assessments levied on the leased land during the term, apply to the lease of the State? We contend that the same rule should be applied to a lease of its land by the State as to the lease of a private person.

2. Does the Act of 1907, and Ordinance No. 15463, passed pursuant to authority conferred by that act, impair the obligation in the State's lease to pay all taxes and assessments levied on the leased land during the term? As we contend the State cannot lease land with such a covenant and then in violation of its covenant attempt to impose on the lessee the burden of paying charges imposed on the land by the authority of the State.

3. Does not a statute which attempts to impose upon a single class of lessees, viz: the lessees of the State, the burden of paying assessments on the leased land deny to them the equal protection of the laws? Every other class of lessees under leases such as these is free from the burdens of such assessments. A single class is selected and made the victims of a harsh statutory rule; does the statute give to these lessees the same equal protection of the law it gives to other lessees? If the statute had been passed prior to the leases, it would have been construed into the lease and made a part of it and we could not complain, but having been passed after the leases, it is much the same as though the statute had selected the lessees on a single street and bound them to pay the assessments for the improvement of that street.

4. Does not a statute or ordinance which attempts to make the lessee pay any portion of the State's debt take the lessees property without due process of law?

It is much like a forced loan; the State by statute authorizes a charge to be imposed on its land, and then selects a victim upon whom it attempts to impose a share of this burden.

ARGUMENT AND AUTHORITIES.

In leases such as these the lessor is bound to pay all taxes, assessments and other charges on the leased land, and the State, the same as a private lessor, is bound by this rule, though in such a case as this the State's covenant takes this form: The State agrees not to impose charges on the leased land and compel the lessee to pay the same.

The lands of the State in the absence of the State's consent are not subject to special assessment for local improvements.

Constitution of the State, Art. VII, Sec. 2.
Hamilton on Special Assessments, Sec. 281.
St. Louis vs. Brown, 155 Mo. 545, 56 S. W. 298.
State vs. Hartford, 50 Conn. 89, 47 Am. R. 622.

2. At the time the leases involved in this action were made no consent had been given by the State to the levying of special assessments on its land; the making of the leases did not subject the *land* to special assessment.

Daugherty vs. Thompson, 71 Tex. 192, 9 S. W. 99.
Davis vs. Burnett, 77 Tex. 3, 13 S. W. 613.

Nor was there any provision of the written or the common law splitting assessments against leased land between lessor and lessee.

3. It is well settled, as the rule of the common law, that, in the absence of a covenant or condition to the contrary, it is an implied covenant in every lease that the lessor, not the lessee shall pay all taxes and assessments levied on the leased land during the term.

Taylor's Landlord and Tenant (7th Ed.) p. 289, par. 341, Sec. VI of Chap. 8.

Woods' Landlord and Tenant, pp. 683, 684, Sec. 417.

18 Am. and Eng. Ency. of Law (2nd Ed.) pp. 650-652.

See also the vast array of authorities collected in Vol. 32, Am. Digest, Century Edition, pp. 578-587, Secs. 519 to 529, all of which recognize the general doctrine.

It would perhaps be more nearly a correct statement of the general doctrine (that the landlord is bound to pay all taxes and assessments against the land, in the absence of an agreement to the contrary) to say that, as a part of his contract for the hiring of his property, the lessor must take care of *all* charges of every kind against the thing leased or hired out; his contract to furnish the leased thing is a continuing one, and he must not permit the lessee to be disturbed in the use of the thing, by any

charge upon it. There is difference in this respect between a lease and a grant. In a grant there are no implied covenants.

The State, as lessor, is bound by the general rule, the same as a private person, that in the absence of an agreement to the contrary, the landlord is bound by an implied covenant to discharge all assessments levied on the land during the term. The authorities directly in point supporting this proposition are few; in fact we have found but one case where the general rule was applied to a lease made by a State.

Western and Atl. R. Co. vs. State of Georgia,
14 L. R. A. 438, see page 455.

In the case cited the State of Georgia leased a railroad belonging to the State to the Western and Atlantic Railway Co., for a term of twenty years, without any agreement or stipulation as to the payment of taxes on that part of the road extending into the State of Tennessee. The determinative facts in that case and the case at bar are parallel *as to that part of the leased railroad which extended into the State of Tennessee.* The latter State levied a tax on that part of the road within its boundary. This tax was paid by the lessee, and the Court held it might be recovered from the State of Georgia (the lessor). There was a stipulation as to taxes imposed by Georgia, but none as to taxes on that part of the road in Tennessee; the suit involved the taxes for the latter part of the road.

While the case of *Western and Atl. R. Co. vs. State of Georgia, supra,* is the only case that we have been able to find where the general rule has been applied against the State, there are no authorities announcing that the State as lessor is not subject to the same rule as a private lessor, and the rule is well settled by authority that "Their contracts (the contracts of a State) have the same meaning as that of similar contracts between private persons." (*Murray vs. Charleston,* 96 U. S. 432, 34 L. C. P. Ed. 760). And "when a State descends from the plane of its soveregnty and contracts with private persons it is regarded, *pro hac vice,* as a private person itself." (*Hall vs. Wisconsin,* 103 U. S. 5, 26 L. C. P. Ed. 302). "When a State becomes a party to a contract as in the case before us, the same rules of law are applied to her as to private persons under like circumstances." (*Davis vs. Gray,* 16 Wall 203, 21 L. C. P. Ed. 447). "Where the nation enter into a contract, it is as much bound as an individual citizen." (*Daggett vs. Boneuitz,* 107 Ind. 279, 7 N. E. 900, p. 902).

This was said of the swamp land grant by the United States to the State of Indiana, citing *Lessieur vs. Price,* 12 How. 59; *Murray vs. Charleston,* 96 U. S. 432; *Gray vs. Coghlen,* 72 Ind. 567.

In *Bond Debt Cases,* 12 N. Car. 200, p. 272, the Court after stating that certain bonds issued by the State were without doubt negotiable securities, then said "there is

as little doubt that States which issue negotiable paper incur the same responsibilities which attach to individuals or corporations in like case," p. 272, citing *United States vs. Bank of Metropolis,* 15 Pet. 392; *Murray vs. Charlestown,* 96 U. S. 445; *Floyd Acceptances,* 7 Wall 666.

If this were a controversy over a lease given by a private lessor there would be no question made by any well informed lawyer that the lessor should have paid *all* of the original assessment, which of course includes the 85 per cent thereof reassessed against the leasehold. An assessment such as this is necessarily againt the land —against the very thing leased. If, after a private lease had been executed, the legislature should enact a statute that the lessee should be compelled to pay the whole or some share of the assessment, no court would uphold such a statute. One cannot imagine a clearer instance of the impairment of the obligation of a contract. If, as the authorities hold, the contracts of a State are subject to the same rules of law as the contracts of a private person, (see the cases just cited, *supra*), how can the State, in this case, escape the ordinary burdens of a lessor?

The statutes under which these leases were executed show clearly that the leases were intended to be ordinary leases, and subject to the legal incidents of such leases. The statutes are the Act of 1897, (Laws of 1897, p. 229-

242, and 253, Sec. 50), authorizing leases of state land, and the Act of 1899 (Laws of 1899, p. 138 and 139), authorizing thirty-year leases of tide land.

The Act of 1897 authorized a lease "for a term of five years or less" (Act of 1897, Sec. 19, p. 242); the term was short, and there was a provision (Sec. 20, pp. 242 and 243) that agricultural land should not be leased at less than ten cents an acre. This part of the act related to school and granted land, and provided for leasing at public auction; and it is clear from a perusal of this part of the act that it was intended to authorize the ordinary lease for a short term—five years or less. In the Act of 1897 (Sec. 50, p. 253), it was provided that tide lands "may be leased in the same manner as provided for the lease of arid land," but in 1899, this was corrected by an amendment to Sec. 50 (Laws of 1899, p. 139, Sec. 2); it was enacted that tide land might be leased the same as school and granted land; this brings the tide land lease into the same legal category as a lease of school or granted land; that is, it is to be construed by the same rules, and is subject to the same legal incidents. A proviso in the amendment of 1899 authorized a thirty-year lease of tide land but this longer term did not change the terms or conditions of the lease, nor subject it to other or different rules than other leases of State land, and it is clear that other leases are ordinary leases, and subject to the general law of leases; the term "lease" is used in the statute without any qualifying

provisions, and under such circumstances the rule of statutory construction is clear, that the word "lease" is used in its generally accepted legal sense; no statutory covenants as to taxes and assessments are provided for and no common law implied covenants are excluded; so the general law of leases would apply and bind the lessor to pay the taxes and assessments levied on the leased land.

The rule that the State as lessor is bound by the same obligations as a private lessor is not qualified or overthrown by the well settled rule that a legislative grant is construed most strongly in favor of the State and against the grantee.

The celebrated Charles River Bridge case (*The Charles River Bridge vs. The Warren Bridge, et al,* 11 Peters (U. S.) 420 L. Ed. 9, p. 773), is the leading case in favor of the strict construction of legislative grants. The reason given is that in all cases of legislative grants the grantees take by a private act generally prepared by themselves, with a view to protect their own, not the public, interest, and therefore they should take nothing by implication. But in this case the act was public and was a general law providing for the leasing of State land. In none of the cases citing the Charles River Bridge case, has the doctrine of that case been so applied as to give a different construction to the contracts of a State, from that applied to the same form of contract where

both parties are private persons, and such an application would violate the well settled rule of this Court, that the same rules are applied to the contracts of a State as to the contracts of private persons. The nearest approach of the case at bar to the application of the doctrine of strict construction against grants of land are the following, found in Rose's notes to the Charles River Bridge case (p. 689).

Slidell vs. Grandjean, 111 U. S. 437; 28:330;

Missionary Soc. vs. Dalles, 107 U. S. 343; 27: 547;

Hancock vs. McKinney, 7 Tex. 445;

Dubuque, etc., R. Co. vs. Litchfield, 23 How. 88; 16:509;

Rice vs. Minn. etc., R. R., 1 Black 380; 17:153.

In *McManus vs. Carmichael, supra,* an island in the Mississippi River was claimed under a grant, which appeared by the records to be bounded by the shore. The Charles River Bridge case was cited to the point that such a grant should be strictly construed, but as the Court held "the grants of land by the United States, in their patents, had relation to the surveys, plats and field notes;" this was enough without the doctrine of the Charles River Bridge case.

In *Slidell vs. Grandjean, supra,* land was claimed under a Spanish land grant; two commissioners had decided in favor of the claimant. Congress confirmed all claims in whose favor the three commissioners had con-

curred. It was held that this excluded the idea that it was intended to confirm claims supported by the decision of only two commissioners, and the Charles River Bridge case was cited to the point that the confirmatory act should be strictly construed.

In *Missionary Soc. vs. Dalles, supra,* the plaintiff claimed certain lands under an act of Congress which confirmed in Missionary Societies among the Indians, lands occupied at the date of the act for such purposes. The plaintiff had abandoned the land in question eleven months before the passage of the act. The Charles River Bridge case was cited in support of the well established doctrine that such grants are strictly construed.

In *Hancock vs. McMurray, supra,* the Court uses this language:

> "But, if the words of the grant be doubtful, we must have recourse to the settled rule of construction applicable to such cases, which is thus stated by Mr. Justice Story, in the case of the *Charles River Bridge vs. Warren Bridge, et al.,* (11 Pet. R., 589). 'If the King's grant admit of two interpretations, one of which will make it utterly void and worthless and the other will give it a reasonable effect, then the latter is to prevail; for the reason (says the common law) that it will be more for the benefit of the subject and the honor of the King, which is to be more regarded than his profit.' 'The King's patents, not only of his liberties, but of his lands, tenements, and other things, should have no strict or narrow interpretation for the overthrowing of them, but a liberal

and favorable construction for the making of them available in law." (1 Kent's Comm., 460, n. b.) p. 445).

In *Dubuque & P. R. R. vs. Litchfield, supra,* Congress granted land for the improvement of the Des Moines River "from its mouth to the Racoon Fork." The grant extended along the side of the river; land *above* the "Forks" was claimed which claim was disallowed, on the ground that the grant should be strictly construed, citing the Charles River Bridge case.

In *Rice vs. Minn. R. R. Co., supra,* Congress passed an act appropriating certain lands to the building of a railroad in the then territory of Minnesota, but providing that no title should pass to the territory, and it was said of this act that no title passed by implication, citing the Bridge case.

The covenant of the State to pay all taxes and assessments on the leased land during the term works a practical exemption of the leasehold from the payment of assessments on the leased *land* for the State cannot impose its burden by statute, on another, nor can the State pass a statute in direct violation of its contract. The lessor's covenant to pay the assessments takes the form, in this case, that the State will not impose burdens on the land and attempt to compel the lessee to discharge them.

To illustrate how this practical exemption is worked

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out, take the facts of a leading case (*New York ex rel Met. St. R. Co. vs. Tax Comm*, 199 U. S. 1, 50 L. Ed. 1) and change those facts by introducing the leading fact of this case, viz: a lease from the State with no express covenants as to taxes or special assessments, that is, with an implied covenant by the State as lessor to pay all taxes or assessments on the leased land. Suppose that in that case (a) the State had owned the entire street railroad system, (b) had leased it for a term of thiry years, reserving rent and with no covenants as to taxes and assessments, (c) that at the time of the lease there was no statute in force authorizing the splitting of taxes and assessments on the leased property between lessor and lessee, and (d) that afterwards the State should attempt to split and apportion such taxes and assessments, and compel the lessee to pay all or a portion of the taxes or assessments on the leased property, a case would be presented where the liability of the lessee to the State or the city (which is only a governmental agency of the State) for taxes and assessments must be asserted in the face and teeth of the State's covenant to pay such taxes and assessments; in short, the State as lessor owes to its lessee the obligation to pay such taxes, and in violation of such obligation attempts to compel the lessee to pay and discharge the State's (the lessor's) debt; such a statute has all the constitutional vice of a forced loan; as well might the State pass a statute authorizing the

property of some selected victim to be sold to pay the State's general debt.

But it may be asked "Why should there be an implied covenant that the lessor (in the absence of an agreement to the contrary) should pay taxes and assessments on the leased property, where there is no implied covenant that the grantor shall pay taxes and other charges against the property over which the franchise is to be exercised? The authorities recognize a difference as to the conditions under which the implication of an agreement arises, but in both cases such an implication *may* arise; in case of a lease it is well settled that the implication arises (1) from the fact of giving a lease, (2) without any covenants as to special assessments. In case of grant of a franchise it arises (1) from the grant of such a franchise, (2) with an agreement as to assessments, which by implication imposes the obligation on the grantor to pay for all improvements not mentioned in the express agreement and the attempt to compel the grantee to pay for improvements within the range of the grantor's implied agreement, must fail. Take the facts of a few actual cases:

In the *Coast Line R. Co. vs. Savannah*, 30 Fed. 646, the city had granted a street railroad franchise requiring the grantor to pave between the rails; the agreement to pave between the rails was held to imply an agreement that the grantee should not be required to pave elsewhere,

and an attempt to compel it to do other paving or pay for it was in violation of this implied agreement, and this implied agreement was the basis of federal jurisdiction in the case, last cited. As may be seen, the wrong against which the plaintiff sought relief was the attempt to compel it to pave or pay for paving a portion of the street outside the *actual* agreement; the *actu*al agreement implied a covenant either (a) that the city would pave, or would pay for paving all the portions of the street not covered by the actual agreement, and this implied covenant is made the basis of federal jurisdiction.

4. The statutes and ordinances authorizing these assessments (a) impair the obligation of the State's lease, for the reason that by the statute and ordinances subsequent to the lease, the lessee is compelled, if these legislative acts are valid, to pay and discharge a burden imposed on the land, which burden is within the State's covenant with its lessee.

The Act of 1907 (Laws of 1907, p. 123), clearly contemplated an assessment of the State's *land*, the same as land held in private ownership and the original assessment was so. Our statutes and the provisions of the City Charter relating to special assessments clearly contemplate a levy against the *land*.

For improvement of the streets, "the city council may levy and collect an assessment upon all lots or par-

cels of land specially benefitted by such improvements * * * * * (City Charter, Art. VIII, Sec. 11. Charter and Ordinances of Seattle, p. 47).

"That cities of the first class shall have power by general ordinance to prescribe the mode in which the charge in respective lots and parcels of land shall be assessed * * * * for the purpose of special assessment * * * * * " (P. C., Sec. 3743). This entire statute contemplates an assessment against the land; the enforcement is against the land; the sale is a sale of land (P. C., Sec. 3743-3745).

Turning to the ordinances in this case it becomes clear that the levy was made against the *land*. Ordinance No. 15463, (Printed Trans., pp. 20 and 21) clearly contemplated an assessment against the *land*, and the trial court so held. (Finding No. XI, Printed Trans., p. 46.) Ordinance No. 21849 (Printed Trans., p. 21) providing for the reassessment expressly recites that fact. This ordinance did not direct the mode of assessment, but the assessment on the land was by the reassessment merely apportioned between the leasehold and the remainder in fee, and this apportionment was approved by Ordinance No. 24498, Sec. 2 of which reads as follows:

"Section 2. That each parcel and lot of land and part thereof named in said roll is specially benefited

by said improvement, and that there be and is
54 hereby assessed against each parcel and lot of land and part thereof contained in said improvement district, as shown in said roll, the respective amounts therein set against such parcel and lot of land and part thereof, between the termini of said improvement abutting upon, adjacent or proximate to said streets and said amounts are hereby declared to be a first lien against each said parcel and lot of land and part thereof against which the same is assessed in said roll; the amount hereby assessed and levied against the property in said local improvement district being the sum of sixty-seven thousand six hundred thirty-five and fifty-four one-hundredths ($67,635.54) Dollars." (Printed Trans., p. 33.)

There is nothing in the other provisions of the ordinance which in any way qualifies this plain, clear legislative declaration that even the reassessment is against the land.

As a matter *of law*, special assessments are against the land.

Chicago, etc., R. Co. vs. Phillips, 111 Ia. 377, 82 N. W. 787, p. 789.

Macon vs. Patty, 57 Miss. 378, p. 386.

In fact a special assessment such as this is necessarily against the land. It assumes a special benefit to the lands; it creates a lien upon the land; for its payment the land may be sold; in short, the assessment is a special proceeding *in rem* against the land. By this we do not wish to be understood that the State may not by statute provide for the splitting of an assessment, and

the division of the entire charge against the land into various fractions and assessing each fraction to a corresponding section or division of the fee; but this question, in this simple form, is not before the Court for decision. This power to split the assessment is here involved with the State's contract to pay *all* the assessments against the *land*, and *all* includes all the parts or sections of the assessment. If the State and its lessee had stipulated that the lessee should pay all the assessments, a statute afterwards passed authorizing cities to split special assessments between the lessor and lessee, would not relieve the lessee from his obligation to perform his entire contract with the State, viz; to pay *all* the assessment; the same would be true of an express or implied agreement, *and* without regard to whether either lessor or lessee is a State or city. If lessor and lessee are private persons and (b) enter into a lease containing special covenants as to the payment of special assessment, or (b) make no covenants at all in which case the burden falls on the lessor by an implied covenant, a statute afterwards passed splitting special assessments between lessor and lessee, would be invalid if it undertook to disturb this contract relation and compel either to assume and pay the other's obligation. The State may split assessments as between lessor and lessee, and compel each to pay its assessed share, *as to future but not as to past leases*, but these statutes and ordinances attempted to apply the rule to past leases.

In *New England M. S. Co. vs. Vader*, 28 Fed. 265, p. 274 (12 Sawy. 74), the Court held that a contract by a mortgagor to pay the taxes on the mortgaged premises, and that if he did not the mortgagee might pay the same and add the amount to his mortgage, would be impaired by a subsequent statute apportioning the tax between the mortgagor and mortgagee, and would be invalid for that reason; it was said that the State could not change the contract rights between the parties. This doctrine results from the contract, and the difference between a lease and a mortgage is a false factor in the matter; the contract would be given the same effect whether found in a mortgage or lease. At the time the contract was entered into the State owned the land in fee simple free from all charges and conditions, and it might have put the land to any use of which land is capable and might have taken the entire income and revenue produced by such actual use, but it chose instead to turn over to its lessee the actual use and as the legal equivalent of the actual use to take from the lessee the rent reserved. By the contract of leasing the rent is made the legal equivalant of the actual use. After agreeing with its tenant that he might have the actual use during the term for the rent reserved, without any liability for charges then resting, or afterwards imposed, on the land, how can the State by a subsequent statute impose a burden on the leased land and require the tenant to pay it? And this

is exactly what is attempted by the statute and the ordinances and the assessment.

The statutes authorizing the levy of special assessments against certain leases only deny to the lessees the equal protection of the laws.

Lessees in general in this State are not by law required to bear any of the burdens imposed on the land. These are, in all cases, the burdens of the owner and he must bear them. The law does not undertake to apportion or shift the burden, but leaves it where it belongs, viz: on the owner of the thing. He may use it himself, directly or indirectly by taking the use in the form of rent, but in either event the burdens on the land are his burdens. By the statutes of 1907 a single class of lessees are selected and made the victims of a special and very burdensome charge, when all other lessees go free, unless by force of their agreement to pay. Two lessees side by side, facing on the same street, are subject to different rules, simply because in one case the lessor is a private person, in the other the State. One must pay the assessment, and cannot deduct it from his rent; the other can. The mere fact that *differences* are made between the lessees of the State on the one hand and the lessees of private owners on the other, will not render the acts repugnant to the Fourteenth Amendment unless the differences are invidious or oppressive, which these differences are.

After these leases are made the State enacts a statute that one of the lessees must pay a share of the special assessment levied against the leased land, and leaves the other lessee to be governed by the former law, which leaves him free from any liability for the assessment. The difference made against the lessee of the State is most invidious and oppressive, and it is he who raises the question, and this invidious distinction is the necessary effect of the Acts of which complaint is made.

5. The assessments take plaintiff's property without due process of law. In the *Coast Land Co. vs. Seattle*, 52 Wash. 380, p. 383, this Court said: "A leasehold interest cannot be sold to satisfy an assessment against the entire fee." Is the case made any better by attempting to compel the leasehold holder to pay a *part* of such a charge? This assessment was made against the land; then, by the reassessment, the city undertakes to compel the appellants to pay a *part* of the original charge. Can the leasehold be sold to pay any part of a charge against the land?

6. *The cases in Washington.* In the *Coast Land Co. vs. Seattle*, 52 Wash. 380, p. 383, and in *Rabel vs. Seattle*, 44 Wash. 482, there are *dicta* to the effect that a leasehold is subject to special assessment for a local improvement. As to future leases there is no objection to a statute which apportions between lessor and lessee the burden of taxes and assessments on the leased land

but to make such a statute applicable to past leases is another thing.

In *Rabel vs. Seattle, supra,* the question whether a statute or ordinance authorizing a special assessment against a leasehold, would impair the obligation of the lessor's contract was not raised or argued, and the judgment of the Court does not turn on the affirmation of the validity of such an assessment. In the *Coast Land Co. vs. Seattle, supra,* the dictum in *Rabel vs. Seattle* was merely repeated without any consideration of the question here involved; while the question was raised, it was not decided, and the judgment rests on another point, so the case is not authority against the present contention, and in any event the question is federal in character and the decisions of the United States Supreme Court are binding while the decisions of the State court are not.

A Review of the Opinion of the Court Below.

The opinion of the court below may be found on pages 56 to 60 of the printed transcript.

1. In reference to the statutes cited by the court (Act of 1905, p. 267, and Act of 1907, p. 123) in the opening of its opinion, we insist that the original assessment was made under the Act of 1907, which in plain express terms authorized an assessment on state tide lands, leased as these, at the same rate as though

they were held in fee simple by private owners, and this statute authorized a sale of the leasehold to pay the charge on the fee. A reference to the ordinances (Ordinance No. 15463, printed transcript, pp. 20 and 21, Ord. No. 21949, *Id.*, pp. 21 and 22, Ord. No. 24498, *Id.*, pp. 32 and 33), will disclose that the original assessment was made against the land—the fee—as contemplated by the Act of 1907, and that the re-assessment was simply a splitting of this charge against the land into two parts, one against the leasehold. the other against the remainder in fee. At this point it may be urged that the splitting of the charge against the land constitutes an assessment against the leasehold and that this assessment against the leasehold is justified under the Act of 1905, quoted by the court. To this there is the plain answer that a local improvement assessment, such as this, is necessarily a charge upon the land, and that every charge upon the land is within the lessors covenant, in the state the state's covenant, and the apportionment of the charge between the two estates into which the fee is split, is simply an attempt by the state to evade its covenant.

THE ACT OF 1905 WAS REPEALED BY THE ACT OF 1907.

Summary of the Provisions of the Acts of 1905 and 1907 and Their Operation.

ACT OF 1905.

a. The Act of 1905 (p. 267) classifies the lands of the state, as (1) tide lands *under lease or contract* (Sec. 1), and (2) all other than tide land. This classification omits from taxation all *tide* land not leased or sold under contract, and includes all state land other than tide land without regard to whether it is leased or sold under contract.

b. The Act of 1905 does not apply to existing leases, if it has "the effect to alter or modify in any particular" any such lease (sec. 7), and inasmuch as the act, if applied, would alter and modify the rights of the parties, we insist the Act of 1905 does not apply to plaintiff's lease and does not authorize the special assessment in question; if applied, the act would impair the state's obligation to pay the taxes and assessments imposed during the term.

ACT OF 1907.

c. The Act of 1907 (sec. 1), differing from the Act of 1905, attempts to authorize special assessments upon *all* state land; it includes tide land not under lease or control which was omitted by the Act of 1905 (sec. 1).

d. The Act of 1907, in express terms, provides that the state's interest shall not be sold.

e. The Act of 1907 omits the provision found in the Act of 1905, to the effect that the act shall not be construed so as to impair an existing lease.

ACT OF 1905. REPEALED.

In support of our contention we call the court's attention to the foregoing summary of the two acts and especially to the following well-known tests of repeal to be found in the two acts:

a. The two acts cover the same ground, viz: Special assessments on state land.

b. The provisions of the two acts differ not only in the language but in matters of substance: Thus the Act of 1905 omits tide land not under lease or contract, while the Act of 1907 includes these lands; the Act of 1905 extends to all cities and towns, while the Act of 1907 extends to cities of the first class only; in reference to the sale of the state's interest, the Act of 1905 is neither very clear nor very strong (provisos to sec. 1), while the Act of 1907 is clear, strong and emphatic. (Provisos to sec. 1).

c. The Act of 1907 omits all reference to existing leases, while the Act of 1905 exempted existing leases if they would be impaired by the act. It may be urged that the Act of 1905 is valid because it excluded existing leases, if they are impaired by it, while the Act of 1907 is invalid for that reason, and that an invalid statute

cannot work a repeal of a former valid statute. This objection is specious but unsound; a statute may be valid as to future contracts, and therefore a valid statute and capable of working a repeal of a former statute, but it may not be retro-active in its operation, if such operation would impair existing contracts; in other words, the statute must have its field of operation confined to future contracts; but this does not affect its validity, and it therefore may work a repeal of an earlier statute. The objection that a statute is invalid because in conflict with the contract clause of the constitution applies only in so far as the act is given a retroactive effect; if that is the only effect that can be given to the act it may be wholly invalid, but that is not generally true; in general, a statute looks to the future, and its future operation may be without constitutional object, while its retroactive effect may be restrained by the contract clause; so we shall assume that either (1) the Act of 1905 does not apply to our leases or (2) that the Act of 1905 is repealed by the Act of 1907, or (3) if it was intended to apply and is not repealed, it is subject to the same constitutional objections as the Act of 1907.

2. The necessity of maintaining unimpaired the state's power of taxation relied upon by the court below as the basis, in part, for its judgment no one will question, but it is just as necessary to maintain the state's honor, and every state dishonors itself when it repudiates or evades its contracts, and by legislation seeks

to impair the obligations of its solemn covenants.

3. The court below holds that it is necessary to show an express exemption from assessment. We have shown such an exemption when we show (a) that the leased land at the time of the lease belonged to the state and was by the law exempt from taxation and assessments, and (b) that the state leased the land and thereby covenanted that the lessee should take over from the state the actual use and in lieu of the actual use pay to the state the agreed equivalent, the stipulated rent, and thereby bound itself by an implied covenant that the lessee should not be subjected to any charges on the leased land, nor ousted from possession through the enforcement of any special assessment. If the state's contract is worth anything the exemption is established.

4. The court below accuses us of having relied on the Charles River Bridge case, and the court takes some pains to distinguish this from that case. We urged in the court below, in practically the same language as used in this brief, that the doctrine of strict construction applied to grants of the state did not justify giving to the state's contract a different meaning from what the same words in a contract between private persons would bear. The court below seems to have misunderstood us.

5. The court below held that "There is a clear distinction to be noted between leases between private

parties and leases granted by the state, in respect to taxes and assessments." The distinction made by the court is that in a lease made by a private person the lessor should, in the absence of a stipulation to the contrary, pay all taxes and assessments on the leased land, while in a lease made by the state this rule would not apply, because in leases made by private persons of property already in private ownership and subject to taxation, the subject of taxation enters into the consideration. For the purpose of the argument we will admit that the question of taxation does enter into the consideration of a lease *but how and with what result?* The result of its entering into the consideration is that the lessee takes the leased property *free from the burdens of taxation and assessment.* This is the *result*, if the lessor performs his contract, for if the lessor discharges these burdens the lessee holds the leased property free from them, and the *result* is a practical exemption from taxation and assessment. While the result of giving a lease is the practical exemption from taxation and exemption of the leased land in the lessee's hands, the reason for this result is not the one given by the court below. The true reason is this: The lessor has the right to use the property and while using it must of course discharge all burdens on it; by his lease he transfers the actual use to the tenant and as its agreed equivalent takes the rent, and he should, *after the lease*, discharge all burdens on the leased land, for

the same reason as when he takes the actual use. The tenant should have the actual use for just what he promises to pay for it, viz: for the rent.

If when the question of taxation enters into the consideration it produces a practical exemption, *as to the tenant*, then for a better reason a lease of land exempt in the hands of the lessor should continue exempt in the hands of the lessee, especially as against a burden purposely and intentionally imposed by the lessor—the state in this case.

If the *burden* of taxation enters into the consideration and by entering in produces a practical exemption of the land in the tenant's hands, then for a better reason the *freedom* from taxation should produce the same result.

This distinction made by the court below might have been disposed of by a word. It rests on the proposition that the words of a lease executed by the state have a different meaning from that given to the same words in a lease given by a private person, but it is the settled law that they have the same meaning.

6. At the top of p. 59, printed transcript, and at the end of the first paragraph, there is an assumption by the court below that because a leasehold may be taxed that therefore it may be made to bear the burdens imposed by the state on the leased land. For the purposes

of the argument we will admit that the leasehold, as a thing of value, may be subjected to the common burdens of taxation on the basis of its value, but the tax in such a case is on the lease as an asset—as a thing of value apart from the land; but this is a very different matter from imposing a tax on the leased land, and compelling its payment by the lessee, which is the case before the court.

The value of a lease depends (1) on its length, and (2) on the excess of income from the use of the leased property over outgo in the form of rent, etc. This value may be taxed, but this is not the question here. The judgment in this case involves an affirmation of the propositions (1) that the state may lease its lands and thereby exchange with the lessee the *actual use* for its agreed equivalent *rent*, and thereby assume the obligation of discharging all burdens then upon the *land* or afterwards imposed, and (2) afterwards impose burdens on the leased land and compel the lessee to pay 85 per cent thereof.

7. There is also an assumption in the opinion that there is no difference between (1) private property acquired by grant, and (2) private property acquired by lease. In this assumption the court is clearly in error. In a lease there is an implied covenant that the lessor shall discharge all burdens on the leased land, but there is no such covenant in case of a grant, and this covenant

is the basis of our entire contention.

We submit the judgment of the Supreme Court of the State of Washington should be reversed as to the assessments on the leaseholds held by the appellants, and the court below should be directed to sustain our objections.

C. W. CORLISS,

Attorney for Appellants and Plaintiffs in Error.

GEO. McKAY,

Of Counsel.

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(22,893)

IN THE

SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1913.

No. ~~817~~ 108

WILLIAM P. TRIMBLE and CANNIE F. TRIMBLE,

Plaintiffs in Error.

vs.

THE CITY OF SEATTLE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

REPLY BRIEF FOR PLAINTIFFS IN ERROR.

C. W. CORLISS,
Attorney for Appellants and Plaintiffs in Error.

GEO. McKAY,
Of Counsel.

(22,893)

IN THE

SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1913.

No. 817.

WILLIAM P. TRIMBLE and CANNIE F. TRIMBLE,

Plaintiffs in Error,

vs.

THE CITY OF SEATTLE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

REPLY BRIEF FOR PLAINTIFFS IN ERROR.

C. W. CORLISS,
Attorney for Appellants and Plaintiffs in Error.

GEO. McKAY,
Of Counsel.

MOTION TO DISMISS.

Counsel for defendant in error have moved to dismiss and affirm for the reason that no federal question was raised in the court below. The superior court, in opposition to our contention, found as a conclusion of law "that the said assessments appearing upon said new assessment or re-assessment roll do not impair the obligation, express or implied, of the State's contract contained in the same leases, nor do the statutes and ordinances authorizing such assessments impair any such obligation." (Second Conclusion of Law, printed Transcript, p. 51.)

In opposition to our contention to the contrary the superior court found as a third conclusion of law as follows:

"That neither the said assessments appearing upon the new assessment or re-assessment roll nor the statutes and ordinances authorizing the same take plaintiff's property without due process of law, or deny to them the equal protection of the laws." (Printed Trans., p. 51.) These two conclusions of law were excepted to. (Printed Trans., p. 52.) Judgment was afterwards entered (Printed Trans., p. 53), and an appeal taken from the judgment. (Printed Trans., pp. 54, 55.) The court below—the Supreme Court of the State—affirmed the judgment of the Superior Court and in doing so necessarily affirmed the second and third conclusions of law

mentioned above. Assignments of error in the Supreme Court of Washington are not a part of the record. They are contained in appellant's brief only, and they are not required to be formal.

The opinion of the supreme court shows that it was written in opposition to our contention that the state's contract covered these assessments and required it to pay them, instead of attempting to compel the lessees to do so. The court below treated the question as an alleged contract or obligation creating an exemption and while it, as we think, missed the point of our contention, it did hold there was no contract obligation, and it therefore denied us a right which we claimed under the constitution and laws of the United States. As to the assignments of error in the court below, as we stated above, they are not a part of the record, so in order to bring them before this court they were incorporated by way of recital in the assignments of error in this court. The assignments of error in this court are three in number and the third assigns as an error by the court below, the overruling of our assignments of error in that court which are then incorporated by recital in the assignments of error in this court. (Printed Trans., pp. 61, 62 and 63.) The assignments of error in the court below are in quotations on pages 62 and 63 of the Printed Transcript. Thus assignment No. 1 in the court below runs thus: "In finding as a matter of fact that the said

leasehold interests are assessable for such improvements." Passing II and III and going to No. IV, we find that assignment No. IV in the court below was as follows: "In making the second conclusion of law," then follows a recital of the words of "the second conclusion of law," then turning to page 51 of the Printed Transcript, the second conclusion of law is stated at length, and shows that the recital in the assignment of error in this court is correct. Taking these up in turn it will be found that each of the assignments in the court below were treated the same way, and incorporated into the third assignment of error in this court.

But passing the third assignment of error, and taking up the second assignment of error in this court (Printed Trans., p. 61), we submit that the federal question is raised. The second assignment of error in this court reads as follows:

"The said court (the Supreme Court of Washington) erred in affirming the judgment of the Supreme Court of King County in so far as said judgment affirmed the special assessments on the leaseholds of the said plaintiffs in error and appellants."

The record clearly shows that these leaseholds are segregated from the other properties covered by the special assessment. They are all found in the fourth finding of fact (Printed Trans., p. 39). So there is no doubt or confusion in the record as to these special assess-

ments, and from the opinion of the Supreme Court of Washington it is clear that no other special assessments were considered, and the entire opinion of that court is directed to a single point, viz.: that there is no contract by the state that we shall have the use of this *land* free from special assessments on the leased *land*. When we come to assign error in the judgment of the court below we could not pick out particular expressions of the court in its opinion; the error was on the judgment, and we hit the bird in the eye by assigning the very error which we urge here. In answer to the point that we should have named the section or provision of the federal constitution upon which we rely, we submit that if we had designated the first clause of section 10 of article I, and section 1 of article XIV of the amendments, as the clauses upon which we rely, this court would not be as well informed of the point we urge as it would be to assign as error the rendering of a judgment affirming these assessments when it is clear from the opinion that the judgment is based on a ruling that there was no such contract as we allege. Whether there is such a contract is a federal question. We submit the motion should be overruled. The authorities cited do not justify a dismissal.

REVIEW OF THE STATEMENT OF THE CASE MADE BY COUNSEL FOR DEFENDANT IN ERROR.

Counsel for the defendant in error are correct in their statement (their brief, pp. 12 and 13) that the property described in paragraph III of the findings of fact (Printed Trans., p. 39) is not involved in this appeal. The property involved is the land, or rather the leaseholds on the land, described in paragraph IV of the findings of fact (Printed Trans., p. 39), and in our assignments of error we prayed that said judgment be reversed and set aside in so far as it affirms the assessments on the said leasehold interests. (Printed Trans., p. 3.) So the judgment of this court, if in our favor, should be a modification merely, setting aside the assessments on the leasehold interests of the plaintiffs in error in the lands described in paragraph IV of the findings of fact of the Superior Court of King County, Washington.

There is no question made by either party that the state owns the fee in the lands mentioned in paragraph IV of the findings of fact, and that the plaintiffs in error hold state leases thereon.

In none of the cases in the Supreme Court of the State of Washington involving the right to tax or assess tide land leases, except this case in the court be-

low, was the precise question here involved either decided or considered so far as the opinions disclose. And with all due respect for the court below, and counsel in in this action, we submit, that all have failed, for some reason, to see the basis of our contention, viz.: (1) That these assessments are against the *land*, and (2) that the obligation of the state as lessor covers all charges against the *land;* (3) that splitting the assessments is not a performance of the state's obligation, and (4) that the state's attempt by statute to authorize these assessments on the *land*, the very thing the state agreed we should have free of all charges, impairs the obligation of its contract.

REVIEW OF THE ARGUMENT FOR DEFENDANT IN ERROR.

The first section of the argument (pp. 28 to 34) is devoted to showing that the leases "are subject to taxation and assessment," and in this part of the argument, as in other sections of their brief, they confuse (1) the right of the state to *tax* these leases on the basis of their value, with (2) the right, or rather want of right, to levy a charge upon the leased *land* in the face and teeth of the state's covenant to pay all charges, taxes and assessments imposed on the *land*.

The leases in this case are contracts, whereby for the rent reserved, the lessees shall have the use of the

leased land for thirty years, and the terms of the lease bind the lessor to discharge all burdens on the leased *land*. The state is the lessor, and when it made the leases, the *land* was free from burdens of every kind; the state might have taken the actual use of the land by applying it to any purpose to which the land can be put; in such a case it would, of course, have been obliged to discharge the burdens on the *land*; by its lease the state granted this actual use, and agreed with its lessee on the value of the actual use, and in lieu of the actual use, agreed to take rent; the agreed rent is the agreed equivalent of the actual use, and the lessor must discharge all burdens on the *land*, the same as when it took the actual use. This contract of the state disables the state to impose burdens on the *leased land* and compel the lessee to discharge them. This works out a practical exemption from the burdens imposed by state authority on the leased *land*.

In section two of their brief, commencing on p. 34, counsel for defendant in error attempt to demonstrate that the state as lessor is not subject to the general rule applied to private lessors, that a lease implies an agreement by the lessor to pay taxes and assessments levied on the leased *land* in the absence of an agreement to the contrary, and here it is conceded there was no agreement to the contrary, and counsel for defendant in error in this part of their argument are not entirely fair

in their statement of our contention. We first stated the general rule that the lessor in the absence of an agreement to the contrary is bound to pay all assessments levied on the leased *land* (p. 15 of our brief). We then stated our contention that this rule applies to leases made by the state, and cited one case (*Western and Atlantic R. Co. v. State of Georgia*, 14 L. R. A. 438, p. 455) where the rule was so applied, and other cases (pp. 17 and 18) to the effect that where it contracts, a state is bound by the same rules of law as are applied to private persons. We, in no sense, rested our whole contention on either the *Western and Atlantic R. Co. v. State of Georgia, supra*, or *Murray v. Charleston*, 96 U. S. 432, though both of these cases support our contention, but they are not the sole support, as may be seen by our brief (pp. 17 and 18). Counsel for defendant in error quote from the Georgia case; the closing sentence of the quotation is as follows: "The State of Georgia, as proprietor of the railroad, had no attributes of sovereignty, and in the transaction figured as an ordinary lessor." Following these words of the court or rather the Special Judicial Commission, counsel says: "The case is not in point in any particular," and proceed to p ove their assertion by pointing out an entirely immaterial difference in the facts between that case and the case at bar, viz.: that the section of the road covered by the agreement of the State of Georgia to pay the taxes

was in Tennessee, instead of Georgia, as though the location of the leased property was a determinative fact which it is not. As to the case of *Murray v. Charleston*, we never cited it as parallel to the case at bar. It, with other cases, teaches the well established doctrine that the state's contract is treated by the law the same as the contract of a private person.

On page 41 of their brief counsel for defendant in error are guilty of some very bad reasoning. They say:

"When a private lessor deals with a private lessee some one must pay the taxes. The burden is imposed by the lease or by implication of law. To say that a state, when it grants a lease of public lands, thereby passing certain rights into the mass of private property, assumes the obligation, in the absence of any stipulation as to taxes in the lease, to pay all taxes and assessments, is tantamount to saying that such private property is exempt from taxation, unless expressly made taxable by the terms of the lease."

When the state makes a lease of its land what is it that passes "into the mass of private property?" Certainly not the land but the mere right to use the land for a term. The state exchanges the use of the land for the agreed rent, and it (the state) cannot impose a charge on the *land* and compel the lessee to pay it.

The next paragraph reads as follows:

"If this Honorable Court shall hold that the State of Washington, in executing these leases, acted as a pri-

vate lessor, dealing with property which long had been a part of the general mass of private property, then the law governing the payment of taxes and assessments as between lessor and lessee applies. If, on the other hand, your Honors shall hold that the state, in executing the leases, dealt as a sovereign state passing certain rights from the mass of public property into the mass of private property, then such leasehold interests are subject to taxation and the rule as to whether lessor or lessee must pay the taxes and assessments does not apply."

Counsel for defendant in error concede in this language that unless the state is to be exempted from the general law of leases because of its sovereignty then the rule for which we contend applies. Both reason and authority concur in the rule that the state when it enters into a contract with a private person can claim no advantage because of its sovereignty, and is bound by the same rules as a private person. The argument that when a private lessor leases private property then subject to taxation, the burden of taxation enters into the consideration, but that the exemption from taxation does not when the state is a lessor and the leased property is exempt from taxation, needs no argument of ours to refute it. The burden in the one case and the exemption in the other enters into the consideration as much in the one case as in the other. The consideraton for the lease, whatever it may be, supports the lessor's implied agreement to pay all assessments on the leased *land*, and in the other case it supports the state's im-

plied covenant that it will not impose or authorize to be imposed charges on the leased land, to be paid by the tenant. When the state imposes a burden on the leased land which it requires the lessee to discharge, it violates by law—impairs—the obligation of its own contract.

In section three of their brief (pp. 45 to 50) counsel for defendant in error argue at some length that these leases are grants, as though such a classification would cut out the covenant of a lessor to discharge the burdens on the leased land. They may classify leases as grants if they please, but they cannot change the law of leases by their classification.

In section four of their brief (p. 51) counsel for defendant in error quote our language to show that we admit some part of their contention. The quotation is taken from p. 29 of our brief and the context clearly shows that we admitted no part of their contention.

Their classification ignores the essential character of a lease. It is a contract for the possession of land. Blackstone says, "An estate for years is a contract for the possession of land" (2 Blackstone, Chap. IX, p. 140). This language is not very accurate. What is meant evidently is that a term is created by a contract for the possession of land. "The termor has only the usufruct . . . . . while the freeholder has the land itself" (2

Hammond's Blackstone, note 35, p. 253). In the early days of the common law a lessee had no estate in the land; he had only a covenant with his landlord for the use of the land, and he had no remedy except on his covenant. Later "by the advice of the Curia Regis, a remedy was provided which the farmer could avail himself of as against any person whatsoever who should turn him out of possession." (Digby's History of the Law of Real Property, 4th ed., p. 179.) The invention of this remedy did not change the character of a lease as a contract for the use of land; it merely added a new legal incident to the contract.

In section five of their brief counsel for defendant in error contend that because the entire charge upon the land—the entire assessment—was split into two sections, one 85 per cent assessed against the leasehold, the other 15 per cent against the remainder in fee held by the state, they have avoided the objection against the assessment held to be fatal in *Coast Land Co. v. Seattle*, 52 Wash. 380. In that case the Supreme Court of Washington held the assessment was void because it was attempted to sell the leasehold for a charge levied against the fee. The splitting of the assessment against the fee into two, one against the leasehold, the other against the fee, furnishes proof conclusive that the assessment is against the land, and simply split into two sections corresponding to the divisions of the fee, the leasehold

and the remainder in fee, but if the state's obligation includes all charges upon the *land*, how can the state escape its obligation by paying fifteen cents on the dollar? The state's obligation extends to the entire assessment against the *land*, and its obligation is not to pay a percentage of the assessment but all of it. There is no legal method by which the state can be released from its obligation to pay the entire assessment. It can not compound with its creditors, nor obtain a discharge of its obligation by paying fifteen cents on the dollar.

We submit the judgment of the Supreme Court of Washington should be reversed, as to the land mentioned in paragraph IV of the findings of fact.

C. W. CORLISS,

Attorney for Appellants and Plaintiffs in Error.

GEO. McKAY,

Of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1913

No. 108

WILLIAM P. TRIMBLE & CANNIE F. TRIMBLE,

PLAINTIFFS IN ERROR,

vs.

THE CITY OF SEATTLE,

DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

BRIEF OF DEFENDANT IN ERROR

THE CITY OF SEATTLE

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BRIEF OF DEFENDANT IN ERROR
THE CITY OF SEATTLE

MOTION TO DISMISS OR AFFIRM ON THE RECORD.

Comes now defendant in error, The City of Seattle, by its attorneys undersigned, and moves this Honorable Court to dismiss the writ of error granted herein to the Supreme Court of the State of Washington or to affirm the decision of the state court on the record and for the following reasons:

I.

No Federal question is involved.

II.

If there is a Federal question involved, it has not been properly raised in the lower courts.

Argument in Support of Motion.

This case is here on a writ of error to the Supreme Court of the State of Washington. Under the local statutes of that state, The City of Seattle, defendant in error, has power to levy special assessments for making local improvements in such city. The special assessments here complained of were levied under such laws. It is expressly stated in the record that all steps and proceedings relating to making such assessments were had and conducted according to law (Transcript of Record p. 51). Plaintiffs in error urge, nevertheless, that they are being deprived of property without due process of law.

Due Process of Law.

There is no color for a contention that a man is deprived of property without due process of law by enforcing against him a decree for alimony rendered in another state in a proceeding in which he appeared and was heard.

Lynde vs. Lynde, 181 U. S. 183, 45 L. ed. 810, 21 Sup. Ct. Rep. 555.

A party who seeks and is given the opportunity to litigate the rights claimed by it cannot have the judgment reversed in the Supreme Court of the United States on the ground that due process of law was denied because the litigation did not result successfully.

Remington Paper Co. vs. Watson, 173 U. S. 443, 43 L. ed. 762, 19 Sup. Ct. Rep. 456.

The property in question consists of certain long term leaseholds in state tidelands within the business waterfront section of the city. A local statute (Laws of Washington, 1907, page 123) subjects this class of private property to special assessments for local improvements. The city has assessed these leaseholds as independent entities from the remaining fee interest. Thus, if the entire estate in a certain lot were in private ownership, the assessment would be levied against the entire property. But, if the public holds the fee interest in a tideland lot, subject to a long term lease in private ownership, then assessment against the entire property would be segregated, a fair proportion being charged to the *state's fee interest* and the rest to the *private leasehold interest*. The leaseholds of plaintiffs in error were thus assessed for a local improvement.

The court below sustained the validity of the local statute authorizing such assessment. It had previously sustained the right of the city to assess such leaseholds under the general law in the absence of an express statute therefor.

Rabel vs. Seattle, 44 Wash. 482.

The leases are ordinary leases and are silent as to taxes and assessments. Plaintiffs in error insist that such leases contain *implied contracts* binding the State of Washington—as grantor—to pay all taxes and assessments which may from time to time be levied against the leasehold, and that a state statute which compels the lessee to pay the same impairs the obligation of such implied contract. The record, however, does not disclose any violation of the Federal Constitution in this regard.

Plaintiffs in error lastly contend that, because the local statute does not make all other classes of state leases, such as leases of farm lands, leases of school lands, leases of escheated lands in cities and in rural communities, subject to assessments for local improvements, such statute deprives plaintiffs in error of the equal protection of the laws. The record on this point discloses the bare assertion that plaintiffs in error are denied the equal protection of the laws.

What *classes of property* are taxable or assessable for local improvements is a local question and not reviewable. Tideland leaseholds form one class of private property, which under a local statute are taxable and assessable.

The state Supreme Court decided no Federal question, nor was any Federal question necessary to its decision; but it disposed of the case on non-Federal grounds sufficient to support its judgment.

Trimble vs. Seattle, 64 Wash. 102; 116 Pac. 647.

The judgment or decree of a state court cannot be re-examined in the Supreme Court of the United States simply because a Federal question was presented to the state court for determination. That court must also decide it.

Crowell vs. Randall, 10 Pet. 368, 9 L. ed. 458.

Israel vs. Arthur, 152 U. S. 355, 38 L. ed. 474, 14 Sup. Ct. Rep. 583.

If the decision of a Federal question is rendered unnecessary by the view which that court properly takes of the rest of the case within the scope of the pleadings, the judgment is not open to review in the Supreme Court of the United States.

Chapman vs. Goodnow, 123 U. S. 540, 31 L. ed. 235.

Wells vs. Goodnow, 150 U. S. 84, 37 L. ed. 1007.

Where the state court disposes of the case upon non-Federal grounds sufficient to support its judgment, it is obvious that the Supreme Court of the United States cannot review such judgment on the theory that a decision of the Federal question was necessarily involved.

McManus vs. O'Sullivan, 91 U. S. 578, 23 L. ed. 390.

Note, 63 L. R. A., p. 42, and cases there cited.

In inquiring whether jurisdiction to review a decree of a state court may be declined because such decree may be sustainable on an independent non-Federal ground, the Supreme Court of the United States considers only the final action of the highest court of the state in disposing of the controversy, and is not concerned with the conclusions of the trial court.

Allen vs. Southern R. R. Co., 173 U. S. 479, 43 L. ed. 775; 19 Sup. Ct. Rep. 518.

It is necessary that the decision of the state court upon a Federal question be controlling in the disposition of the case.

Citizens Bank vs. Board of Liquidation, 98 U. S. 140, 25 L. ed. 114.

The only questions which will be considered are those which are involved in the record, and received the consideration of the state court.

First Natl. Bank vs. Kentucky, 9 Wall. 353, 19 L. ed. 707.

Hamilton Mfg. Co. vs. Mass., 6 Wall. 632, 18 L. ed. 904.

Marsh vs. Nichols, S. & Co., 140 U. S. 344, 35 L. ed. 413, 11 Sup. Ct. Rep. 798.

No Contract Obligations Impaired.

The leases in question are state grants, not contracts. The state conveyed what the instruments show upon their faces, no more. There are no express covenants respecting taxes and assessments. None are implied. These leases are units of property formerly in the general mass of public property, non-taxable and non-assessable except by statute, now in the general mass of private property taxable and assessable as all other units of private property.

It should appear that there is a legal contract subject to impairment, and some ground to believe

it has been impaired before the court will assume jurisdiction.

New Orleans vs. New Orleans Waterworks Co., 142 U. S. 79, 35 L. ed. 943, 12 Sup. Ct. Rep. 142.

St. Paul Gaslight Co. vs. St. Paul, 181 U. S. 142, 45 L. ed. 788, 21 Sup. Ct. Rep. 575.

Yesler vs. Wash. Harbor Line, 146 U. S. 646, 36 L. ed. 1119, 13 Sup. Ct. Rep. 190.

Mills vs. St. Clair County, 8 How. 569, 12 L. ed. 1201.

A real and not a fictitious Federal question is essential to the exercise of this jurisdiction.

Hamblin vs. Western Land Co., 147 U. S. 531, 37 L. ed. 267, 13 Sup. Ct. Rep. 353.

II.

If a Federal Question Is Involved, It Has Not Been Properly Raised in the Lower Courts.

Under the local statute the grounds of objection to a proposed assessment of local improvements by the City Council must be definitely stated in writing. The only objection raised by plaintiffs in error before the City Council which could involve a Federal question was as follows (Transcript of Record p. 31):

"That the said re-assessment is irregular, illegal and void and in violation of the rights secured to these protestants by the laws and constitution of the State of Washington and the Constitution of the United States."

The objection was raised before the trial court on appeal from the action of the City Council (Transcript of Record p. 35).

The attention of the state court must be directed to the particular section of the Federal Constitution, or to the Federal statute, on which reliance is placed and to the right claimed under it.

Maxwell vs. Newbold, 18 How. 511, 15 L. ed. 506.

Chapin vs. Fye, 179 U. S. 127, 45 L. ed. 119, 21 Sup. Ct. Rep. 71.

Hoyt vs. Sheldon, 1 Black 518, 17 L. ed. 65.

Farney vs. Towle, 1 Black 350, 17 L. ed. 216.

Capital City Dairy Co. vs. Ohio, 183 U. S. 238, 46 L. ed. 171.

Clark vs. McDade, 165 U. S. 168, 41 L. ed. 673.

An objection to the admission of a judgment record in evidence on the ground that the law under which the proceedings were had was unconstitutional and void is too general to give the Supreme Court

of the United States jurisdiction of a writ of error to a state court.

Messenger vs. Mason, 10 Wall. 507, 19 L. ed. 1028.

We respectfully submit that our motion to dismiss the writ of error or to affirm on the record should be granted.

Not waiving our motion and in the event that this court shall assume jurisdiction, we respectfully submit the following brief on the merits.

STATEMENT OF THE CASE.

This is an appeal from the action of the City Council of The City of Seattle, a municipal corporation of the first class, confirming a re-assessment upon certain tidelands and tideland leaseholds under Ordinance No. 21,849 of The City of Seattle. The original improvement was for the construction of a plank roadway and wooden sidewalks on Sixth Avenue South in The City of Seattle, from Seattle Boulevard at Charles Street to its intersection with Charlestown Street; thence easterly along Charlestown Street to Eighth Avenue South, as provided for in Ordinance No. 15463 of said city.

The proper proceedings relating to the reassessment were taken by The City of Seattle. Due notice of the hearing upon the reassessment roll was given as provided by law and the charter and ordinances of The City of Seattle. Appellants appeared before the City Council within the time provided by law and offered their objections to the reassessment in writing, which objections, after being considered by the council, were overruled, and the reassessment was confirmed by ordinance.

From the action of the City Council in overruling such objections and confirming the reassessment roll, an appeal was taken to the Superior Court. After a full hearing, the court made and entered its findings and conclusions of law in favor of the city, and entered judgment overruling each and all of appellants' objections and confirmed the reassessment roll. From such action this appeal was prosecuted to the State Supreme Court, which court decided all contentions in favor of The City of Seattle. The case is brought before this court on a writ of error.

There are two classes of property involved in this appeal.

The *first class* consists of certain property which the appellants own in *fee*. This property is described in the third paragraph of the Findings of Fact (Transcript of Record, p. 38). Throughout this brief references to the record will be to the pages of the *printed* record. The total amount assessed against this property upon the reassessment roll is the sum of $1,228.20. The propriety of the assessment against this property is not called into question by appellants in their opening brief in any way, shape or form. No exception was taken to the Findings of Fact and Conclusions of Law or judgment affecting this property. It is in no sense involved in this

proceeding. There is nothing left for the court to do in this matter, except to affirm the decision of the lower court as to this property.

The *second* class of property involved in this appeal consists of certain *leaseholds* in and to certain state tidelands described in paragraph IV of the Findings of Fact (Transcript of Record, p. 39). In the original assessment levied for this improvement, the entire assessments, so far as they related to the lots described in said paragraph IV of the Findings of Fact, were charged to the lessee. In the reassessment the same principal sum was levied in each instance, but it was segregated so that the state's fee interest and the lessee's leasehold interest were each made to bear separately their respective proportionate amounts. The City Council, sitting as a board of equalization, concluded that fifteen (15) per cent. of each such principal sum should be borne by the state's interest, and eighty-five (85) per cent. by the lessee's interest. This may be illustrated by an instance taken from paragraph XI of the Findings of Fact (Transcript of Record, p. 48), first showing the charge made upon the original roll, and then that made upon the reassessment roll.

(Original Assessment Roll.)

"W. P. Trimble, E. 120 feet of Lot 24, Block 271, Seattle Tide Lands Addition, assessed $250.00."

(Re-Assessment Roll.)

"State of Washington fee simple interest in following: E. 120 feet of Lot 24, Block 271, Seattle Tide Lands Addition, assessed $37.80."

"W. P. Trimble, leasehold interest in following: E. 120 feet of Lot 24, Block 271, Seattle Tide Lands addition, assessed $214.20."

The property involved in this appeal is located upon the tidelands in The City of Seattle. The condition before and after the city has projected a first improvement upon the tidelands is well typified by the sixth Finding of Fact made by the court (Transcript of Record p. 45):

"The said tideland lots owned in fee by plaintiffs and those held by them under leases from the State of Washington, and all that portion of said street upon which the same abut, are located upon the tideflats, covered in low tide to a depth of about 4 feet, and in high tide covered with water to a depth of about 10 feet; that all the lots held in fee or under lease by plaintiffs have been and still are vacant and unimproved; that prior to the construction of said plank roadway and sidewalk all the lots abutting upon that portion of said Sixth Avenue South so improved were vacant and inaccessible except by row boats in high tide; that since said improvement was made and completed a number of factories and other business structures have been erected upon property abutting upon said Sixth Avenue South, and such property has constantly been occupied and in use since said time."

In no instance have any lessees ever protested against the city making such improvements; and

some of them have paid their assessments. Others, notably appellants, have been and are evading payment for public improvements specially benefiting their properties, and hindering the development of one of the city's most necessary areas.

History of Tideland Lease Litigation.

A statement of the litigation arising out of assessments affecting leases of Seattle tidelands will perhaps make the issues involved in this appeal stand out in simple, bold relief. Ownership of the tidelands in Seattle Harbor was asserted by the state in Sec. 1, Art. XVII, State Constitution. This ownership was confirmed by the early case of *Eisenbach vs. Hatfield*, 2 Wash. 236, and the numerous cases following its rule.

Board of Harbor Line Comrs. vs. State ex rel. Yesler, 2 Wash. 533, 535 (re-examined).

McCue vs. Bel. Bay Water Co., 5 Wash., 159.

Yesler vs. Board of Harbor Line Comrs., 146 U. S. 646; 36 L. ed. 1120; 13 Sup. Ct. 190.

Shively vs. Bowlby, 152 U. S. 56; 36 L. ed. 351; 14 Sup. Ct. 569.

Burrows vs. Grays Harbor Boom Co., 44 Wash. 640.

Van Siclen vs. Muir, 46 Wash. 41.

Muir vs. Johnson, 49 Wash. 68.

Sequim Bay Canning Co. vs. Bugge, 49 Wash. 132.

Bruce-Hergert Mill Co. vs. State, 49 Wash. 331.

Gifford vs. Horton, 54 Wash. 600.

The Legislature, by Laws of Washington, 1897, p. 32, confirmed the plat of "Seattle Tide Lands." From time to time the state has sold or leased lots or portions of lots in this plat. Appellants have heavy interests in these tidelands, and, so far as the property in this case is concerned, hold three such leases.

The *first* question to be decided was whether or not such a leasehold interest was taxable. King County taxed the leases. An action was brought against the County Treasurer (*Moeller vs. Gormley*, 44 Wash. 465; 87 Pac. 507), to restrain the collection of such taxes. The court said (p. 467):

"Under a constitution such as ours, it is the general rule that all property other than public is assessable, and before any exception can be allowed there must be found unequivocal authority therefor. But the converse of this rule is applicable to public property. Before any property belonging to the state can be subjected to taxation, clear and unmistakable authority therefor must be made to appear. It is contended by respondent herein that to impose a tax upon this leasehold, while nominally asserting taxation against the property of an individual, would practically and actually amount to the levy-

ing and enforcement of a tax against the state; that as tidelands of this character are leased for a term of years to the highest bidder, it must be presumed that the state obtains the full rental value for the use of these lands; that this being true, it naturally follows that the amount of rental obtainable from any person willing to pay the full rental value of said lands would be increased or decreased to the extent of the tax imposed accordingly as he should be, or not be, required to make payment thereof; that the assessment falls upon the right to use the property; that is a right which is vested in the state, but which the state during a given period permits the individual to exercise; that in its last analysis, such taxation is upon the property of the state, and consequently not permissible under Sec. 2 of Art. VII of the State Constitution, which reads as follows:

"'* * * That the property of the United States and of the state, counties and school districts, and other municipal corporations, * * * shall be exempt from taxation.'

"This argument is plausible and the proposition advanced appears sound as a theory. But we think it cannot, under the general scheme and purpose of taxation, successfully bear the test of practical application. Doubtless a prospective lessee would bid more for a lease if he knew that his leasehold interest would not be taxed. But the same may be said of a prospective purchaser of state lands. He would pay more for the fee if he knew it would remain exempt from taxation. The difference between the two is in degree only, and not in character. But it is the policy of our commonwealth that the fee in any real estate sold by the state shall thenceforth be assessable. As soon as title passes from the state the land becomes private, and no longer public property. When a lease is given by the state to an

individual or private corporation, the lessee thereby obtains for his or its private use certain rights and privileges in, to and upon such real estate. These rights and privileges constitute private property over which the lessee has, and may exercise, absolute dominion and ownership within the limitations of his or its lease. Why, as such property, it should not be subject to the general rule of taxation, we conceive of no reason."

Moeller evaded payment of his tax, however, because his leasehold had been assessed as *personalty* instead of *realty*.

The *next* question raised was whether or not a leasehold interest in state tidelands could be assessed to pay for public improvements, affording special benefits to such leasehold interest. The question came up in *Rabel vs. City of Seattle*, 44 Wash. 482; 87 Pac. 520. The court said (p. 483):

"Where local improvements are legally proposed by a municipality subject to the bidding of a prospective leaseholder for the property covered by his lease, and such improvements when made constitute a special benefit to such leasehold interest, we believe that said interest can be subjected to an assessment to pay for the special benefits thus accruing. Before delivering a lease, all of the property in a given parcel of real estate belongs to the State; hence, at such time it is nonassessable for any purpose, unless clearly and expressly made so by the constitution or statute. When, however, any private individual or corporation acquires a leasehold of said property for a given period, the state ceases to be the owner of such interest during said time, but the lessee thereby becomes the owner of the rights

accorded by the lease, and such rights are private property and assessable under the general rule of taxation. If the value of the right to the use of this property during, and by virtue of, the existence of the lease is specially enhanced by reason of a local improvement not contemplated and taken into consideration by the state at the time of accepting the lessee's bid for the lease, there would seem to be no reason in law or right why this interest should not be assessed as all other private property specially benefited by said improvement. But such an assessment must be limited to the leasehold interest, and not made against the interest retained by the state."

Rabel, however, evaded payment of his assessment. The lease in question was a renewal of his first lease and was dated from the expiration thereof, making his rights continuous in time; still, because the local improvement had been *provided* for during the life of the first lease, the court held that no assessment could be levied against the second lease.

At the time the local improvement involved in the *Rabel* case was initiated, there was no statute authorizing assessments against leasehold interests in state tidelands for local improvements. In 1905 the Legislature passed Chapter 144, page 267, and in 1907, passed Chapter 73, page 123, relating thereto.

Section 1 of the Act of 1905, page 267, is as follows:

"Section 1. That all leasehold, contractual or possessory interests in any tidelands owned by the State of Washington in fee simple (in trust or otherwise), situated within the limits of any incorporated city or town in this state, and which have been leased by the state, or which are held by any person, firm, association, private corporation or municipal corporation under a contract of purchase from the state, may be assessed and charged for the cost of all local improvements specially benefiting such leasehold, contractuary or possessory interest, which may be ordered by the proper authorities of such city or town; and such leasehold, contractual or possessory interest, for all the purposes of the assessment and collection of the cost of any such local improvement, shall be treated as the private property of such lessee or owner of such contractual or possessory interest; provided, that the provisions of this section of this act shall apply only to tidelands; and provided further, that nothing in this section shall be construed to affect the title of the state, nor shall any lien for such assessment attach to the fee simple title of the state."

Section 1 of the Act of 1907, at page 123, is as follows:

"Section 1. Any city of the first class in the State of Washington is hereby authorized and empowered to include within any local improvement district formed by it the whole or any part of any land in school sections or tide lands, title of which remains in the State of Washington, and said city is authorized and empowered to assess the cost of any local improvement against any such tide or school land in the same manner as if the same were private property; provided, however, that the interest of the state in such property shall not be sold to satisfy the lien of such assessment, but only such interest, or contract or other right therein as may

be in private ownership shall be subject to such sale."

This was the state of the law when, in July, 1907, The City of Seattle passed an ordinance providing for planking a portion of Colorado Street, and creating a local improvement district to pay the cost and expense of such improvement. Within the limits of said district lay Lots 2 and 3, Block 340, Plat of Seattle Tide Lands. The fee interest in said lots was vested in the State of Washington, subject to a thirty-year lease held by the Coast Land Company, a corporation. This lease was originally issued to W. P. Trimble, one of the appellants in this proceeding. He assigned it to the Coast Land Company. In levying the assessment against this property, no attempt was made by the city to assess the leasehold interest as a separate entity from the fee in the lot, nor was it indicated what portion of the assessment made was intended to be made a charge upon such interest. The lessee brought an action to restrain the city from collecting the assessment by selling the lessee's leasehold interest. A demurrer to the complaint was sustained by the lower court, and the lessee appealed. The case is reported in *Coast Land Company vs. Seattle*, 52 Wash. 380; 100 Pac. 856. At page 383 the court said:

"A number of questions are suggested by the assignments of error and discussed in the briefs of counsel, but the conclusion we have reached on the principal question involved renders it unnecessary to review the others. It is contended, we think rightly, that the method of collecting the assessment provided for in the statute of 1907, above quoted, is void as its enforcement would deprive the leaseholder of his property without due process of law. The statute provides, it will be observed, for the assessment of land belonging to the state benefited by local improvements as if the same were private property, and when the land has been leased, that the leasehold interest may be sold to satisfy the entire assessment. The Legislature may authorize the assessment of a leasehold interest for a local improvement in so far as the leasehold interest is benefited by the improvement, and may provide for a sale of the leasehold to satisfy the lien of the assessment; in fact, we have so held in *Rabel vs. Seattle*, 44 Wash. 482; 87 Pac. 520; but clearly a leasehold interest cannot be sold to satisfy an assessment against the entire fee. In so far, therefore, as the statute of 1907 purports to provide for such a sale it is void.

"The respondents argue, however, that the rule should not apply to the instant case for the reason that here the only interest benefited by this improvement is the leasehold interest. But it is sufficient answer to this to say that the appellant has never had its day in court on this question. Inasmuch as the assessment was not made against its interest, but is made upon the entire property, it was not called upon or given an opportunity to contest whether its interest in the property was the sole interest benefited, and it must be given this opportunity before the charge is irrevocably fixed against its interest.

"The respondents are not aided by the statute of 1905. That statute required an assessment

against the leasehold interest as a separate entity, and no such assessment was made. If we should hold, therefore, that the statute of 1907 was void in toto we could not hold that this assessment was authorized by the statute in 1905.

"The judgment is reversed with instruction to reinstate the case and require the defendants to answer over."

Following the decision of the *Coast Land Company* case, The City of Seattle proceeded, in conformity therewith, to make re-assessment in the several local improvement districts in the Seattle tidelands affected thereby. The case at bar is the first to come before the State Supreme Court and this court under these re-assessment proceedings. The act, under which this re-assessment was made, is as follows:

Laws of Washington, 1893, p. 226, *Rem. & Bal. Code*, Secs. 7894-7905.

Section 1 of said Act reads as follows:

"Section 1. That whenever an assessment for laying out, establishing, closing, straightening, altering, widening, grading, regrading, paving, re-paving, planking, re-planking, sidewalking and bridging, macadamizing, re-macadamizing, graveling, re-graveling, piling, re-piling, capping, re-capping, any street avenue or alley, or for any local improvement which has heretofore been made or which may hereafter be made by any city or town, has been or may be hereafter declared void and its enforcement under the charter or laws governing such city or town refused by the courts of this state, or for any cause

whatever has been heretofore or may be hereafter set aside, annulled or declared void by any court, either directly or by virtue of any decision of such court, the council of such city or town shall, by ordinance, order and made a new assessment or re-assessment upon the lots, blocks or parcels of land which have been or will be benefited by such local improvement, to the extent of their proportionate part of the expense thereof, and in case the cost shall exceed the actual value of such local improvement the new assessment or re-assessment shall be for and based upon the actual value of the same at the time of its completion; and to this end the board of public works or other proper authority of such city or town shall make a new assessment roll in equitable manner with reference to the benefits received as near as may be in accordance with the law in force at the time such re-assessment is made, and when the same shall have been confirmed and approved by the council it shall be enforced and collected in the same manner that other assessments for local improvements are enforced and collected under the charter or laws governing such city or town; but all proceedings relative to making the expense of local improvements chargeable upon property benefited thereby, required and provided by the charter or laws of such city or town prior to the making of original assessment roll, shall not be included nor required within the purpose of this act."

In the instant case the leasehold interests belonging to appellants were re-assessed as separate entities from the fee in the several lots, and it was indicated plainly what amount of the assessment was intended to be made a charge upon such interest; notice of hearing upon the re-assessment roll was given as required by law, appellants were called

upon to appear and given an opportunity to contest whether their leasehold interests in the property were specially benefited by this improvement in the sum assessed against the same and whether or not such assessments were proportionate to the other assessments upon such roll, and to make any and all objections to such roll which they might have or claim. Appellants did appear before the council, contested the assessments, and from the action of the council in overruling their objections and confirming such re-assessment roll, appealed to the Superior Court. There a full hearing upon the matter was had.

At the conclusion of the hearing the court found (Findings of Fact, par. V; Transcript of Record p. 44) that the improvement had been provided for after the date of the execution and delivery of all of the leases involved; that (Findings of Fact, par. IX; Transcript of Record p. 46) all formal steps and proceedings upon such re-assessment, including the notice of time and place of hearing objections to such re-assessment roll were had as provided by law; that (Findings of Fact, par. XII; Transcript of Record p. 50) appellants' leasehold interests were subject to assessment for said improvement and were specially benefited by said improvement in an amount in excess of the sum

assessed against each such separate leasehold interest by reason of such improvement, and were assessed upon such new assessment or re-assessment roll proportionately with other property throughout said local improvement district and proportionately with the interest of the State of Washington in said leased lands. Conclusions of Law were made and entered, the objections of appellants and all of them were overruled, and judgment was entered confirming such re-assessment roll, from which judgment an appeal was prosecuted to the Supreme Court of the State of Washington, which court affirmed the judgment of the lower court. From its action in so doing this case is brought here on writ of error.

Contentions of Plaintiffs in Error.

Counsel for plaintiffs in error urge before this honorable court:

1. That as between private parties, in the absence of any stipulation to the contrary, lessor must pay all taxes and assessments levied against the land during the term of the lease; and, hence, counsel contends, the Act of 1907, which compels lessee to pay local or special assessments levied against such separate leasehold interests—

(a) Impairs the obligation of contract, and

(b) Deprives lessee of property without due process of law.

2. That a state statute which attempts to impose upon a single class of lessees, viz., the lessees of the state, the burden of paying assessments, denies such lessees the equal protection of the laws.

3. That while a state lease may be a "grant," it is still subject to the same rule as a contract between private parties.

Contentions of Defendant in Error, The City of Seattle.

Counsel for The City of Seattle, defendant in error, respectfully submits to your honors:

1. That the leases in question are subject to taxation and assessment.

2. That the state is under no obligation to pay taxes and assessments imposed upon the leaseholds under consideration.

3. That such leases are state grants.

4. That plaintiffs in error were not denied the equal protection of the laws.

5. That plaintiffs in error were not deprived of property without due process of law.

ARGUMENT.

We shall not discuss the contentions of plaintiffs in error *seriatim*, but consider them together.

I.

The Leases in Question Are Subject to Taxation and Assessment.

"Presumtively all property within the territorial limits of a state is subject to its taxing power. Whoever insists that it is not so subject has the burden of proof, and must make it entirely clear, that by contract or otherwise, the property is beyond its reach."

Chief Justice Brewer, in N. Y. ex rel. Metro. St. R. Co. vs. State Bd. of Tax Commrs., 199 U. S. 1; 50 L. ed. 65.

In *Providence Bank vs. Billings*, 4 Pet. 514; 7 L. ed. 939, Mr. Chief Justice Marshall, in delivering the opinion of the court, said (p. 561; L. ed., p. 955):

"That the taxing power is of vital importance, that it is essential to the existence of government, are truths which it cannot be necessary to reaffirm, they are acknowledged and asserted by all. It would seem that the relinquishment of such a power is never to be assumed. We will not say that a state may not relinquish it, that a consideration sufficiently valuable to induce a partial release of it may not exist; but as the whole community is interested

in retaining it undiminished, that community has a right to insist that its abandonment ought not to be presumed in a case in which the deliberate purpose of the state to abandon it does not appear."

See also

Vicksburg, S. & P. R. Co. vs. Dannis, 166 U. S. 665; 29 L. ed. 770; 6 Sup. Ct. Rep. 625.

In *Wells vs. Savannah*, 181 U. S. 531; 45 L. ed. 986; 21 Sup. Ct. Rep. 697, the law was thus stated by Mr. Justice Peckham:

"The payment of taxes upon account of property otherwise liable to taxation can only be avoided by a clear proof of a valid contract of exemption from such payment; and the validity of such contract presupposes a good consideration therefor. If the property be in its nature taxable the contract exempting it from taxation must, as we have said, be clearly proved. It will not be inferred from facts which do not lead irresistably and necessarily to the existence of the contract. The facts proved must show either a contract expressed in terms or else it must be implied from facts which leave no room for doubt that such was the intention of the parties, and that a valid consideration existed for the contract. If there be any doubt on these matters, the contract has not been proven."

In *Chicago Theological Seminary vs. Illinois*, 188 U. S. 662; 47 L. ed. 641, 23 Sup. Ct. Rep. 386, the same justice declared:

"The rule is that, in claims for exemption from taxation under legislative authority, the exemption must be plainly and unmistakably granted; it cannot exist by implication only; a doubt is fatal to the claim."

See also

Erie R. Co. vs. Penn., 21 Wall 492; 22 L. ed. 595.

Wilmington & W. R. Co. vs. Alsbrook, 146 U. S. 279; 36 L. ed. 972; 13 Sup. Ct. Rep. 72.

Ford vs. Delta & P. Land Co., 164 U. S. 662; 41 L. ed. 590; 17 Sup. Ct. Rep. 230.

"In grants from the public nothing passes by implication."

Charles River Bridge vs. Warren Bridge, 11 Pet. 420, 549; 9 L. ed. 773, 824.

The leases are in every sense property in their nature usable, vendable, transferable, inheritable, under the laws of the state, and thus constitute real wealth in the ownership of the lessee. This precise question has been decided by the Supreme Court of Washington.

Moeller vs. Gormley, 44 Wash. 465.

Rabel vs. Seattle, 44 Wash. 483.

Coast Land Co. vs. Seattle, 52 Wash. 380.

Thus it will be seen that at the instant of their execution, at the moment they passed into the mass of private property, plaintiffs' leases became subject to the common burden of taxation. The omission of one or a dozen legislatures to provide for their taxation did not destroy the power of a subse-

quent legislature to do so. Under the changing conditions of modern civilization, classes of private property, formerly considered of little worth, spring into prominence and acquire a value heretofore unthought of. To say that such property is not subject to taxation merely because it has not been taxed is erroneous.

So, when the Legislature, by the Acts of 1905 and 1907, subjected such leases to taxation, it did not impose an additional burden upon them. It merely imposed a burden to which they had been subject during their entire life. That is, the leases were subject to this burden in the absence of an express provision in the leases exempting them from taxes and local assessments.

The inquiry then is, do the leases or any of them, contain such a contract of exemption on the part of the State? Is there any such stipulation to be found in the instrument? It must be admitted that there is none. Each lease is absolutely silent on the question of taxes and assessments. If a contract on this subject is to be gathered from the lease, it must be by implication. But the universally accepted rule is that in grants from the public nothing passes by implication. In leases such as these of plaintiffs in error, no rights are taken from the public or given to the lessees beyond those which the words

of the lease, by their natural and proper construction, purport to convey. Plaintiffs' leases contain no word exempting them from taxation and none can be implied. Applying these well established rules to the leases, it will be perceived that there was no express relinquishment of the right of taxation. Plaintiffs in error must rely upon some implication and not upon any direct stipulation for exemption. Under the terms of the lease the State of Washington

(a) Grants lessees the use of the leased land for thirty years.

(b) Grants lessees a preference right to release, and in the case of one of the leases, a preference right to purchase.

(c) Grants lessees the right to remove improvements—under the provisions of the Act of 1899, page 254.

This is the State's obligation.

The lessees are bound

(a) To pay an average rental of $5.75 per lot in advance.

(b) To assign the leases only upon approval of State.

(c) To acknowledge that certain improvements will become part of realty unless moved or sold pursuant to Act of March 16, 1897.

That is all lessees are bound to do. As a consideration for their grant, the lessees are to pay a certain rental and such payment is nowhere said to be in lieu of, or as an equivalent or substitute for, taxes.

If such lease is exempt from taxation, such exemption must be based upon a valid consideration appearing in the lease, or arising by necessary implication therefrom. Words importing such consideration are not written in the lease. *The implied covenant of the lease is, not that it is exempt from taxation, but, that unless there is an express stipulation not to tax, the right is reserved as an attribute of sovereignty.*

Mr. Justice Brewer in *N. Y. ex rel Metro. St. R. Co. vs. State Bd. of Tax Commrs.*, 199 U. S. 38, said:

"In the well considered opinion of the Court of Appeals in this case it was stated by Mr. Justice Vann: 'The condition upon which a franchise is granted is the purchase price of the grant, the payment of which in money, or by agreement, to bear some burden, brought the property into existence, which thereupon became taxable at the will of the legislature, the same as land granted or leased by the State. There is no implied covenant that property sold by the State, cannot be taxed by the State, which can even tax its own bonds, given to borrow money for its own use, unless they contain an express stipulation of exemption. The rule of strict construction applies to State grants, and unless

there is an express stipulation not to tax, the right is reserved as an attribute of sovereignty'."

For the reasons above shown, defendant in error submits it to be the settled law that, under the facts at bar, these leases are private property, subject to taxation and assessment from the instant of their execution; that the Acts of 1905 and 1907 are merely an exercise of the power subject to which the leases were accepted; that the Acts are applicable to plaintiffs' leases; and, by reason of subjecting the leases to taxation, they neither impair an obligation on the part of the State not to tax the leases, nor deprive appellants of property without due process of law.

II.

The State is Under No Obligation to Pay Taxes or Assessments Imposed Upon the Leaseholds Under Consideration.

Counsel for plaintiffs in error argues that the leases are contracts and that when the State enters into a contract it comes down to the level of ordinary individuals, and that in the absence of a stipulation as to taxes or assessments in the lease, the State as lessor is bound to pay the taxes and assessments or reimburse lessees if they are compelled to pay the same.

In support of this theory numerous authorities are cited. An examination of these reveals the fact that they deal entirely with the rights and liabilities of private lessors and private lessees, dealing with private property subject to taxation.

Defendant in error contends

(1) That the State's right to tax lessees' leasehold interests in tide lands, the fee of which is vested in the State, is a sovereign right, identical with the right to tax other private property in the State.

(2) That by reason of the lease there is no contract, express or implied, compelling the State to pay all taxes or assessments levied upon lessees' property, or compelling the State to reimburse lessees for such taxes or assessments as they may be compelled to pay.

(3) That in the case at bar the leasehold interests are private property and are assessable as separate entities from the interest remaining in the State.

Plaintiffs in error rely upon the case of

Western & Atl. R. Co. vs. State of Georgia, 14 L. R. A. 438, 455.

In that case the State of Georgia, as owner of a private railroad extending from a point in Georgia to a point in Tennessee, leased the same to the Wes-

tern & Atl. R. Co. for a term of twenty years. The lease contained a stipulation as to taxes imposed by Georgia, but none as to taxes imposed by Tennessee. The court in its opinion, at page 443, said:

"The State of Georgia was on the 24th day of October, 1870, the proprietor of a railroad, extending from the west side of Loyd Street in the City of Atlanta, Georgia, to the southerly side of Ninth Street in the City of Chattanooga, Tennessee. This property, at that time, was so much out of repair and in such condition of dilapidation that its proprietor was confronted with the alternative of laying out a large sum of money to put it in good working order, or to lease it for a term of years to persons who would make the necessary outlay. The proprietor elected to act upon the latter alternative, and in pursuance of an Act of the Legislature of the State of Georgia, approved October 24, 1870, and after taking the steps prescribed by said Act, leased said railroad December 27, 1870, for a term of twenty years to certain natural persons, who, thereupon by operation of the Act aforesaid, became the Western & Atlantic Railroad Company. There was no essential peculiarity nor anything exceptional in the transaction. It had the ordinary and usual incidents of a lease contract. The State of Georgia, as proprietor of the railroad, had no attributes of sovereignty, and in the transaction figured as an ordinary lessor."

The case is not in point in any particular.

First, as to that portion of the railroad within the taxing limits of Georgia, there was a stipulation as to taxes. In the case at bar there is no such stipulation. Second, as to that portion of the rail-

road beyond the borders of Georgia there was no stipulation as to taxes. Tennessee assessed this portion, the lessee was compelled to pay such taxes and on suit recovered therefor from the State of Georgia. Suppose the State of Washington had acquired title to certain land in the State of Oregon, and had leased it to A with no stipulation as to taxes. Then suppose that Oregon taxed this property and collected from the lessee, and that lessee on suit recovered back the same from the State of Washington. The facts in this hypothetical case are parallel to the Georgia case, but are in no sense the facts at bar.

Counsel has cited the case of *Murray vs. Charleston*, 96 U. S. 432, 24 L. ed. 760, in support of the proposition that the State cannot change, by taxation, rights which it has conferred by contract. In this case the City of Charleston owed $35,262.35 represented by so-called "stock" of the City of Charleston. The stock was in reality a debt of the city, the evidence of which was certificates whereby the city promised to pay the owners thereof the sums of money therein mentioned, together with six (6%) per cent. interest, payable quarterly. The city under two ordinances directed its appraiser to assess certain taxes upon the real and personal property of the city, and said ordinances further

declared that the taxes assessed on city stock should be retained by the city treasurer out of the interest thereon, when the same became due and payable. The city withheld such tax out of plaintiffs' interest money and plaintiff brought suit to recover. Counsel in his opening brief (page 17) quotes from the decision of Mr. Justice Strong in the case, but the omission is sufficient to make the quotation misleading. What the court actually said was (24 L. ed. p. 763):

"The truth is, states and cities, when they borrow money and contract to repay it with interest, are not acting as sovereignties. They come down to the level of ordinary individuals. Their contracts have the same meaning as that of similar contracts between private persons. Hence instead of there being in the undertaking of a State or city to pay, a reservation of a sovereign right to withhold payment, the contract should be regarded as an assurance that such a right will not be exercised. A promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity."

In the light of the full decision it is seen that the court did not say that "when States enter into contracts they come down to the level of the ordinary individuals." It is said: "The truth is, States and cities, when they borrow money and contract to repay it with interest, are not acting as sovereignties. They come down to the level of ordinary individuals."

The plaintiff in the Murray case was in reality attempting to establish the rule that the city could

not tax the interest money on its stock, due plaintiff. In the case at bar plaintiffs in error are urging that the State cannot authorize a tax upon their property. Mr. Justice Strong, continuing in his opinion, said:

"Is, then, property which consists in the promise of the State or of a municipality of a State, beyond the reach of taxation? We do not affirm that it is. A State may undoubtedly tax any of its creditors within its jurisdiction for the debt due him and regulate the amount of the tax by the rate of interest the debt bears, if its promise be left unchanged. A tax thus laid impairs no obligation assumed. It leaves the contract untouched. But until payment of the debt or interest has been made, as stipulated, we think no act of State sovereignty can work an exoneration from what has been promised to the creditor, namely: payment to him, without a violation of the constitution. The true rule of every case of property founded on contract with the government is this: It must first be reduced into possession, and then it will become subject in common with other similar property, to the right of the government to raise contributions upon it. It may be said that the government may fulfill this principle by paying the interest with one hand, and taking back the amount of the tax with the other. But to this the answer is, that, to comply truly with the rule, the tax must be upon all the money of the community, not upon the particular portion of it which is paid to the public creditors, and it ought besides to be so regulated as not to include a lien of the tax upon the fund. The creditor should be no otherwise acted upon than as every other possessor of moneys, and consequently, the money he received from the public can then only be a fit subject of taxation when it is entirely sepa-

rated (from the contract) and thrown undistinguished into the common mass. 3 *Hamilton Works*, 514, *et seq.* Thus only can contracts with the State be allowed to have the same meaning as all other similar contracts have."

It becomes apparent at once that the facts in *Murray vs. Charleston* are in no sense parallel with the facts at bar. There the city owed a contract debt to Murray, taxed his debt as private property, and withheld a portion of the debt in payment of its taxes. This the court said could not be done, but it announced the rule that the debt—as private property—was taxable, "when it is entirely separated (from the contract) and thrown undistinguished into the private mass." In the case at bar it is not the State which owes rent money to appellant and has levied a tax on such debt and withheld a portion thereof in payment of such tax—it is plaintiffs in error who owe the State an annual rental. No tax has been levied upon this rent money nor is the rental in issue in any form.

The case of *Murray vs. Charleston* does not sustain counsel's contention that the State must pay all taxes and assessments levied upon lessees' property, or reimburse lessees for such taxes and assessments paid by it. On the contrary it supports our contention that these leasehold interests, being pri-

vate property, are subject to the same burdens of taxation as other private property.

When a private lessor deals with a private lessee some one must pay the taxes. The burden is imposed by the lease or by implication of law. To say that a State, when it grants a lease of public lands, thereby passing certain rights into the mass of private property, assumes the obligation, in the absence of any stipulation as to taxes in the lease, to pay all taxes and assessments, is tantamount to saying that such private property is exempt from taxation, unless expressly made taxable by the terms of the lease.

If this Honorable Court shall hold that the State of Washington, in executing these leases, acted as a private lessor, dealing with property which long had been a part of the general mass of private property, then the law governing the payment of taxes and assessments as between lessor and lessee applies. If, on the other hand, your Honors shall hold that the State, in executing the leases, dealt as a sovereign State passing certain rights from the mass of public property into the mass of private property, then such leasehold interests are subject to taxation and the rule as to whether lessor or lessee must pay the taxes and assessments does not apply.

One or these two conditions exists. Both cannot. In view of the decisions of the State court, in *Moeller vs. Gormley, Rabel vs. Seattle*, and *Coast Land Co. vs. Seattle, supra*, and the decisions of the United States Supreme Court, the only conclusion possible in the case at bar is that the rule for payment of taxes and assessments as between private lessor and private lessee does not apply, that the leaseholds are subject to taxes and assessments and that plaintiffs in error alone stand charged to pay all taxes and assessments levied against such leasehold interests.

It is further urged that the State, in collecting taxes and assessments upon appellants' leasehold is disturbing appellants in their right of *quiet enjoyment of the leased land*. We have shown that the property is subject to taxation. It is a most novel theory to advance that a State in collecting taxes and assessments which it has a right to collect is disturbing a lessee in his right of quiet enjoyment. It may be admitted that the State upon receipt of its annual rent money is bound not to dispossess lessees or disturb their use of the land under the leases. If the collection of taxes impairs an obligation on the part of the State not to disturb the lessees in their quiet enjoyment of the leased land, then such land is of necessity exempt from taxation.

But the leaseholds are subject to taxation, and the power to enforce and collect such taxes exists and by such collection the State impairs no obligation of the lease as to quiet enjoyment.

There is a clear distinction to be noted between leases between private parties and leases granted by the State in respect to taxes and assessments. In leases between private parties, the entire estate is, at the time of the execution of the lease, in private ownership—subject to taxation and assessment. Whether the land is used or not, leased or not, taxes are levied against the entire estate, and in leasing it the question of taxes and assessments against the land as a whole becomes one of the elements necessarily affecting the consideration of the lease.

In a lease granted by the public, however, the fee is not taxed, being public property, and the question of taxes does not enter into the consideration. After the State's lease is granted—the leasehold interest passes into the common mass of private property, completely severed from the remaining non-taxable State fee so far as the matter of taxation is concerned—stripped from the remaining fee interest as fully as if the State had sold one of two State tide land lots—the estate sold was public, is now private—was not taxable, is now taxable, and the question of when and to what extent the taxing

power of the State shall be exercised upon the tide land lot sold or the tide land lease sold by the State, in nowise enters into the consideration in the sale of the lot or the sale of the lease. After the tide land lot is sold, it becomes private property and the entire private interest is taxable; after the tide land lease is sold, it becomes private property and the entire private interest is taxable—true, it must be taxed as separate entity from the public fee, but it is nevertheless subject to the common burden of taxation.

We respectfully submit:

(1) That the State's right to tax the lessees' leasehold interests in Tidelands, the fee of which is vested in the State, is a sovereign right, identical with the right to tax other private property in the State.

(2) That these leases contain no covenants, express or implied—

(a) Compelling the State to pay any taxes or assessments levied upon these leaseholds as separate entities, or

(b) Compelling the State to reimburse lessees for such taxes and assessments as they may be compelled to pay.

(3) That no contract obligation is violated or

impaired by the special assessments at bar or by the laws and decisions authorizing the same.

III.

Such Leases Are State Grants.

Plaintiffs in error argue that the leases are contracts, not grants; that they contain implied covenants that the State will pay any and all taxes and special assessments levied against the land, and that it is a breach of the covenants of the leases for the local statute to subject the leaseholds to assessments.

The word "grant" is defined in 20 *Cyc.*, 1358, as follows:

"Grant—As a noun, the act of granting—a bestowing or conferring; the passing of real estate from one to another; the thing granted or bestowed, a gift, a boon; a term originally used to signify a conveyance of an incorporeal hereditament, of such things whereof no livery could be had, of things which lay in grant and not in livery, which could not pass without a deed; a mode of assurance applicable, not to estate in possession of which livery of seizin may be made but to incorporeal estate or to estates in reversion or remainder of which livery cannot be made; but now a word of far more extended application and said to be applied where anything is granted or passed from one to another, in its largest sense comprehending everything that is granted or passed from one to another, and is applied to every species of property; a generic term applicable to all transfers of real property; a transfer of property by deed or writing, especially an appropriation or conveyance made by the government; a transfer in writing; *a nomen generalissium*,

applicable to all sorts of conveyances, feoffments, bargains and sales, gifts, leases, charges and the like, leases in writing or by deed, and sometimes by word without writing ;feoffments, gifts, leases, releases confirmations or surrenders; also sometimes used as meaning a concession, q. v., an admission (q. v.) of something as true."

"As applied to public grants it implies the conferring by the sovereign power of some valuable privilege, franchise or other right of like character upon a corporation, person or class of persons."

Downs vs. U. S., 113 Fed. 144, 147; 51 C. C. A. 180.

"Public grant is the mode and act of creating a title in an individual to lands which had previously belonged to the government."

Estes Park Toll Road Co. vs. Edwards, 3 Colo. App., p. 74, 32 Pac. 549.

"This court in line with others, has held that a leasehold for a term of years was an 'interest in lands'."

Moeller vs. Gormley, 44 Wash. 469.

Reilley vs. Anderson, 33 Wash. 58.

Chicago Attach. Co. vs. Davis Sewing Mach. Co., 142 Ill. 171, 31 N. E. 438.

Sanford vs. Johnson, 24 Minn. 172.

McKee vs. Howe, 17 Colo. 538, 31 Pac. 115.

Plaintiffs in error concede that if the leases be grants no covenants are implied—that in the absence of stipulations relating to taxes and assessments, they must pay all such taxes and assessments levied against the leaseholds.

But, they contend, the leases are contracts governed by the rule relating to leases between private parties, and that in the absence of any stipulations relating thereto, the burden is upon the lessor to pay all taxes and assessments levied against the leased land—that in as much as the leasehold is a fraction of the entire fee, the imposition of a portion of the special assessment upon the leasehold direct is an indirect method of compelling lessees to pay that part of the assessment properly chargeable to the fee as a whole—thereby impairing the obligation of the contract.

The leases are silent as to taxes and assessments, therefore appellants must rely upon an "implied covenant." The implication on principle, if it exists at all, is the same as to taxes as it is to special assessments. In each case it presupposes a good consideration therefor.

The question as to whether the State of Illinois had contracted away its taxing power, was before the court in *Board of Directors of the Chicago Theological Seminary vs. Illinois*, 188 U. S. 662, 47 L. ed. 641-648. By Legislative Act the corporation was created for educational purposes and exempted from taxation. Certain of its property was used only in connection with the seminary, the rest was owned,

rented or held as an investment, although the income was used solely for school purposes. Taxes were assessed against the latter class of property, in the enforcement of which the Seminary claimed that the contract contained in its statutory charter was impaired. Section 5 of that Act reads as follows:

"Sec. 5. That the property, of whatever kind or description, belonging or appertaining to said seminary, shall be forever free and exempt from all taxation, for all purposes whatsoever."

The Illinois court held against the claim for exemption, which judgment this court affirmed.

Mr. Justice Peckham, who delivered the opinion of the court, said (page 648):

"The rule is that in claims for exemption from taxation under legislative authority, the exemption must be plainly and unmistakably granted; it cannot exist by implication only; a doubt is fatal to the claim."

And again:

"It is contended by counsel for plaintiff in error that the words 'said seminary,' contained in Sec. 5 of the Charter, referred to the corporation created by the Act, and not to the school buildings and grounds, and that, therefore, the exemption necessarily exempted from taxation all the property against which the judgments below were rendered.

"Here are two different constructions of the exemption clause, each of which might be maintained with some plausibility. That view which limits the range of the exemption to property used in immediate connection with the seminary might seem to many to be the correct one, while in the opinion of

others the broader claim of total exemption would be the best founded. The judges of the Supreme Court of Illinois have unanimously taken the former view, while counsel for the plaintiff in error very strongly and very ably has taken and maintained the other. We can ourselves see that a construction either way would not be clearly erroneous, or, at any rate, either construction would not be so obviously erroneous as to leave no doubt upon the question. In such cases we think the rule as to the construction of statutes of exemption from taxation should be applied, and as there may be room for reasonable doubt whether a total or only a partial exemption was meant, the partial exemption should alone be recognized. Great weight ought also to be attached to the decision of a State court regarding questions of taxation or exemption therefrom under the Constitution or laws of its own state. As is said in *Wilson vs. Standefer*, 184 U. S. 399, 412, 46 L. ed. 612, 618, 22 Sup. Ct. Rep. 384, 389:

> "'Especial respect should be had to such decisions when the dispute arises out of general laws of a State regulating its exercise of the taxing power, or relating to the State's disposition of its public lands. In such cases it is frequently necessary to recur to the history and situation of the country in order to ascertain the reason as well as the meaning of the laws, and knowledge of such particulars will most likely be found in the tribunals whose special function is to expound and interpret the State enactments.'

"We acknowledge and affirm the principle that this court in this class of cases must decide upon its own responsibility as to the existence and meaning of the contract, but in arriving at such meaning in a case like this, the decision of the State court is entitled to exercise marked influence upon the ques-

tion this court is called upon to decide, and where it cannot be said that the decision is in itself unreasonable or in violation of the plain language of the statute, we ought, in cases engendering a fair doubt, to follow the State court in its interpretation of the statutes of its own State."

We submit that the leases are State grants; but that whether they be grants or contracts, there are neither express nor implied covenants that the State shall pay any taxes or special assessments levied against the leaseholds.

IV.

Plaintiffs In Error Are Not Denied the Equal Protection of the Laws.

The argument is advanced by counsel that plaintiffs in error are denied the equal protection of the laws, in that their leases are made to bear their proportion of special benefits for local improvements, while private leases and other state leases are not charged by statute.

The leaseholds of plaintiffs in error are assessed and charged exactly on the same basis as other leasehold units in the same class, a statutory grouping limited to leasehold interests in state school sections or tidelands within first class cities.

Does counsel contend that laws authorizing cities of the first class to levy for local improve-

ments deny property owners the equal protection of the laws because such laws do not extend to cities *of other classes?* Or, is it contended that plaintiffs in error are denied the equal protection of the laws because the act in question authorizes the assessment of state tideland leases in cities of the first class, but does not authorize the assessment of leaseholds of other state lands, used for farming purposes, for the building of county roads? Clearly, there is no foundation in law for either contention.

Counsel for plaintiffs in error admits this in his opening brief, pages 28 and 29, where he states:

"By this we do not wish to be understood that the state may not by statute provide for the splitting of an assessment, and the division of the entire charge against the land into various fractions and assessing each fraction to a corresponding section or division of the fee, but this question in its simple form is not before the court for decision."

The entire matter of local assessments is statutory in character. Cities of the first class may assess certain property and other property they may not assess. In cities of certain classes, State tidelands may be assessed if the legislature so enacts—in other cities they may not. It is entirely competent for the legislature to declare that leaseholds in State tidelands shall be assessable—and to say

nothing regarding leaseholds in other classes of state lands—it is all a matter of legislative policy and expediency—a matter addressing itself to the legislative and not the judicial branch of government.

Besides, this question is not before the court. There are no private leases involved in this proceeding, and no state leases, except leases of state tidelands. Leaseholds of plaintiffs in error are specially benefited by this local improvement—they are assessable for the same as separate entities—and the Trimbles must pay the assessments thereon, no matter whether private leaseholds or leaseholds in state farm lands in Eastern Washington are accessible or not.

We respectfully submit that this contention of plaintiffs in error is without merit.

V.

Plaintiffs In Error Are Not Deprived of Property Without Due Process of Law.

Counsel argues on page 32 of his opening brief that plaintiffs in error are being deprived of their property without due process of law—in that the city is undertaking to compel them to pay *a part* of the entire original assessment. In the *Coast Land*

Company case, *supra*, the assessment against the entire fee was charged to the leaseholder. For the city to collect an assessment thus levied, under the Act of 1907, would deprive the leaseholder of his property without due process of law. The court said (52 Wash., p. 383):

"The legislature may authorize the assessment of a leasehold interest for a local improvement in so far as the leasehold interest is benefited by the improvement, and may provide for a sale of the leasehold to satisfy the lien of the assessment; in fact we have so held in *Rabel vs. Seattle*, 44 Wash. 482, 87 Pac. 520; but clearly a leasehold interest cannot be sold to satisfy an assessment against the entire fee."

In the case at bar, the state's portion is assessed to the state, the leaseholder's portion to the leaseholder—each as a separate entity. In the case just cited the assessment was held bad because it charged the lessee to pay the state's portion—now plaintiffs in error say the re-assessment is bad because it seeks to make them bear their own burden. They had their day in court on the question of the assessment against their property—they now seek to evade payment of their share of a public improvement, the fruits of which they are now enjoying, and can enjoy every day. Their property is assessable—the state is under no obligation to pay their bills for them—they have been assessed in accordance with law.

Paragraph IV of the Conclusions of Law, (Transcript of Record, page 51), reads as follows:

"That The City of Seattle and its officers and agents had full and lawful authority to make such new assessment or re-assessment, and each and all of the steps taken by said city, its officers and agents, are regular, valid and lawful."

No attack was made in the *nisi prius* court upon the proceedings taken to make the re-assessment, as the court found, nor was the question raised in the State Supreme Court, nor has counsel pointed out before this court any particular wherein the city has proceeded without due process of law. We further submit the cases, cited in our motion herein to the question of due process of law, as a part of this argument on the merits. We submit that this contention is without merit.

OPINION OF STATE SUPREME COURT IN CASE AT BAR.

The decision of the Supreme Court of the State of Washington in the case at bar is entitled *Trimble vs. Seattle*, and is reported in 64 Wash. 102, 116 Pac. 647. In the opinion in that case the late Chief Justice Dunbar, speaking for the court, said:

"The findings of fact are not contested by the appellants, except as to one or two findings which it is contended by the appellants are more properly conclusions of law than findings of fact. But the principal contention is that, inasmuch as these

leasehold interests had been acquired by the appellants prior to the passage of the laws providing for their assessment which we have quoted above, the appellants' rights must be determined under the rule of common law; that in the absence of a covenant or condition to the contrary, it is an implied covenant in every lease that the lessor shall pay all taxes and assessments levied on the leased land during the term; and that no statutory provision to the contrary had been passed at the time the leasehold interests were executed. Conceding this to be the established law in relation to private contracts or contracts between private individuals, it seems to us that a distinction must exist between a contract between private individuals, where the property leased or granted or sold is property which is already subject to taxation and where the parties must necessarily enter into the contract having in mind the burden of taxation upon said property, and a contract entered into by a private individual and a sovereignty where the property, by reason of its being the property of the sovereign, was not subject to taxation. It has been the universal announcement by courts and law writers that inasmuch as taxation is necessary to the existence and perpetuation of government, there will be no implied exemptions from that burden. Chief Justice Marshall, in delivering the opinion of the court in *Providence Bank vs. Billings*, 4 Pet. 514, among other things, said:

'That the taxing power is of vital importance; that it is essential to the existence of government; are truths which it cannot be necessary to reaffirm; they are acknowledged and asserted by all. It would seem, that the relinquishment of such a power is never to be assumed; we will not say that a state may not relinquish it; that a consideration sufficiently valuable to induce a partial release of it may not exist; but as the whole community is interested

in retaining it undiminished, that community has a right to insist that its abandonment ought not to be presumed, in a case in which the deliberate purpose of the state to abandon it does not appear.'

"It is conceded that there is no expressed purpose on the part of the state in the contract under discussion to relinquish the right to demand the payment of taxes upon the leasehold interest sold by the state. In *Wells vs. Savannah*, 181 U. S. 531, Justice Peckham, speaking for the court, said:

'The payment of taxes on account of property otherwise liable to taxation can only be avoided by clear proof of a valid contract of exemption from such payment and the validity of such contract presupposes a good consideration therefor. If the property be in its nature taxable the contract exempting it from taxation must, as we have said, be clearly proved. It will not be inferred from facts which do not lead irresistably and necessarily to the existence of the contract. The facts proved must show either a contract express in terms, or else it must be implied from facts which leave no room for doubt that such was the intention of the parties and that a valid consideration existed for the contract. If there be any doubt on these matters, the contract has not been proven and the exemption does not exist.'

"It would seem that grave doubts would exist if we were to look to the contract only concerning this exemption, and it is not from the contract that the appellants claim the exemption, but from the general rule which obtains in private contracts where, as we have seen, the contract is with reference to property which is known to be taxable at the time the contract is made.

"Appellants rely upon *Charles River Bridge vs. Warren Bridge*, 11 Pet. 420. But that case construed in connection with the general rule announced by the Supreme Court of the United States in the

cases from which we have just quoted, and which follow the rule announced by all courts and text-writers, does not sustain appellants' contention, and is not applicable to the circumstances of this case. The learned attorneys for the respondent have expressed so clearly the status of the law of this case that we take pleasure in incorporating their language in this opinion and adopting it as a part of the opinion of this court. It is said:

'There is a clear distinction to be noted between leases between private parties and leases granted by the state in respect to taxes and assessments. In leases between private parties, the entire estate is, at the time of execution of the lease, in private ownership—subject to taxation and assessment. Whether the land is used or not, leased or not, taxes are levied against the entire estate, and in leasing it the question of taxes and assessments against the land as a whole becomes one of the elements necessarily affecting the consideration of the lease. In a lease granted by the public, however, the fee is not taxed, being public property, and the question of taxes does not enter into the consideration. After the state's lease is granted, the leasehold interest passes into the common mass of private property, completely severed from the remaining non-taxable state fee so far as the matter of taxation was concerned—stripped from the remaining fee interest as fully as if the state had sold one of two state tideland lots—the estate sold was public, is now private—was not taxable, is now taxable, and the question of when and to what extent the taxing power of the state shall be exercised upon the tideland lot sold or the tideland lease sold by the state, in nowise enters into the consideration in the sale of the lot or the sale of the lease. After the tideland lot is sold, it becomes private property and the entire private interest is taxable; after the tideland lease is sold it becomes private property and

the entire private interest is taxable—true, it must be taxed as separate entity from the public fee, but it is nevertheless subject to the common burden of taxation.'

"But outside of general authority, we think this question has been put at rest by the decisions of this court. In *Moeller vs. Gormley*, 44 Wash. 465, 87 Pac. 507, it was held that a leasehold interest in tidelands under leases from the state is subject to taxation. While it is true that the case was decided against the contention of the city in that case upon another proposition, nevertheless it was stated by the court in the discussion of the case that two questions were presented, (1) is such leasehold interest taxable; and (2) if taxable, should it be assessed as realty or personal property? Noticing the contention that the leasehold interest was not taxable, we said:

'But we think it cannot, under the general scheme and purpose of taxation, successfully bear the test of practical application. Doubtless a prospective lessee would bid more for a lease if he knew that his leasehold interest would not be taxed. But the same may be said of a prospective purchaser of state lands. He would pay more for the fee if he knew it would remain exempt from taxation. The difference between the two is in degree only, and not in character. But it is the policy of our commonwealth that the fee in any real estate sold by the state shall thenceforth be assessable. As soon as title passes from the state the land becomes private, and no longer public, property. When a lease is given by the state to an individual or private corporation, the lessee thereby obtains for his or its private use certain rights and privileges in, to and upon such real estate. These rights and privileges constitute private property over which the lessee has, and may exercise, absolute dominion and ownership within the limitations of his or its lease. Why as such

property, it should not be subject to the general rule of taxation, we conceive of no reason.'

"In *Rabel vs. Seattle*, 44 Wash. 482, 87 Pac. 520, it was also held that a leasehold interest in state lands was subject to taxation, although it was not subject to an assessment for local improvements made prior to the time of the letting of the land by the state. This announcement of the policy of the state was again endorsed and ratified in *Coast Land Co. vs. Seattle*, 52 Wash. 380, 100 Pac. 856, where it was said:

'The legislature may authorize the assessment of a leasehold interest for a local improvement in so far as the leasehold interest is benefited by the improvement, and may provide for a sale of the leasehold to satisfy the lien of the assessment; in fact we have so held in *Rabel vs. Seattle*, 44 Wash. 482, 87 Pac. 520.'

"In that case it was also held that a leasehold interest could not be sold to satisfy an assessment against the entire fee. But the disposition which was made of these cases only went to the method of collecting the assessments, while in each instance they affirmed the doctrine that the leasehold interest was assessable; and believing that the announcement made in those cases is in harmony with the general principles of law in relation to taxation, we endorse what was said therein.

"The judgment is affirmed."

SUMMARY.

The special issue in this case is whether or not there are covenants, express or implied, in these leases requiring the state to pay all taxes and local assessments levied against the entire fee—state's interest and leasehold interests. If such covenants exist, then appellants contend the attempt to enforce collection of these assessments impairs the obligation of contract. If they do not exist, then the leaseholds, being private property otherwise subject to assessment, are chargeable with such assessments.

An examination of the leases discloses the fact that there is no express agreement that the state shall pay the assessments. This counsel concedes. But he argues, there is an implied covenant in the case of public leases as in the case of private leases. A lease, he claims, is not a *grant*, but a *contract*—and a contract to be measured by the rules governing contracts between private parties. He concedes that if the leases are grants, no implied covenants as to payment of taxes and assessments by the lessor arises. But, he insists, they are contracts, identical with private leases, that the state is liable for the entire assessment against the public estate and against the private estate, and any proceeding which compels Trimble to pay his portion of the cost of

an improvement specially benefiting his leaseholds impairs the obligation of contract, deprives him of property without due process of law, and denies him the equal protection of the law.

We submit:

(a) That the leaseholds are subject to taxation and assessment. That the state's right to tax leasehold interests in tidelands, the fee of which is vested in the state, is a sovereign right, identical with the right to tax other private property.

(b) That the leases are grants, and in cases of public grants no implied covenants arise.

(c) That even though the leases be contracts, still no implied covenant arises that the state shall pay lessees' taxes.

Lessees are in identically the same position with respect to local assessments as they are in with respect to taxes. Since there is no covenant relating to taxes, there is none relating to assessments.

(d) That there being no agreement exempting the leaseholds from taxation and assessment, and no covenant, expressed or implied, that the state will bear any and all taxes and assessments levied and assessed against the leaseholds, it follows:

(1) That the attempt to enforce collection of the assessments at bar does not impair any obligation of the leases.

(2) That the lessees cannot look to the state for payment of the assessments against their leaseholds.

(e) The state leaseholds, for purposes of taxation and assessment, are really to be considered and regarded as separate entities from the fee.

(f) That in fact there is no Federal question involved in this proceeding which confers jurisdiction on the Supreme Court of the United States:

(1) Due process of law. It is conceded and the record shows that all steps in making the assessment were regular, due notice given and hearing had. Jurisdiction cannot attach on account of this point.

(2) Equal protection of the laws. These leaseholds were treated exactly like other leaseholds in the same statutory class. The question raised on this clause does not confer jurisdiction.

(3) Impairment of obligation of contract. Counsel's main contention is that these leases are contracts, not grants, and that as contracts they contain implied covenants that the state must pay all taxes and assessments charged to the leases. In our view neither of these contentions are sound nor supported by the authori-

ties. There is no contract as to taxes and assessments, hence none can be implied.

(g) That as to plaintiffs in error's property owned *in fee* the judgment of the lower court must be affirmed.

(h) That as to the assessments upon the *leaseholds*, no Federal question has been raised and the interpretation placed by the state court upon the general law and local statutes will be followed by this court.

In conclusion, we cannot refrain from inviting the attention of the court to the great public concern involved in this appeal. On the part of appellants, the underlying purpose is twofold: (1) To evade payment; (2) to impose upon the state the entire burden of the assessment now levied against both the state's fee interests and the private leasehold interests. Common reason dictates that the state cannot afford to hold these lands in the commercial section of the city, subject to long term leases (returning average yearly rentals, in the case at bar of only $5.75 per lot) and also to pay the total cost of all local improvements, the fruits of which lessees are now enjoying.

On the other hand, not only Seattle but every seaport city in the State of Washington, rightly

looks to its harbor areas, its tidelands as the vital point in commerce and transportation between sea and land—low, level areas upon which are developing and to be developed factories, warehouses, wholesale establishments, docks, wharves, railway terminals, mills, elevators and the manifold activities which bespeak a modern growing seaport city. On the eve of the opening of the Panama Canal the necessity for the rapid development and utilization of these areas is more than ever apparent.

This section is from its very character practically inaccessible in the absence of public improvements. Such improvements must therefore precede, and ever keep in advance of, the development and extension of these areas and these activities. Success in city building is not an accident, but the resultant of all the forces, civic, political and legal, of a community and a state in turning barriers and obstacles and permitting the fullest development of the city's opportunities and resources. The barrier to the development of our municipal harbor areas and tidelands today consists in the unsettled condition of the law relating to assessment of state leaseholds. A few improvements have been projected, but no extensive development is possible until a decision is reached in the case at bar.

If this court shall affirm the judgment of the state court, the Chinese wall about these tidelands will crumble and disappear. Sections retarded by lack of improvements can be served by improved streets and sidewalks, by water, sewer, light, heat and power. Commerce, trade and business may freely grow and expand thereon. But if this court shall reverse the judgment of the state court, the great barrier will be reinforced and strengthened; public improvements will not be made, development must slacken and such activities as do venture thereon must operate permanently under difficulties and a seaport's greatest asset will remain—walled up. In adjudicating the rights of the litigants at bar, this court should not lose sight of the public interests involved, nor of the public policy in regard thereto expressed in the state statutes and sustained by the decisions of the state's highest tribunal.

We submit that the Supreme Court of the State of Washington committed no error and that its judgment should be affirmed.

Respectfully submitted,

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Of Counsel.

TRIMBLE *v.* CITY OF SEATTLE.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

No. 108. Argued December 9, 1913.—Decided January 5, 1914.

The state court having declared the policy of the State as excluding a constructive obligation to indemnify against the exercise of the sovereign power of taxation from leases given by the State, this court will not overthrow it.

In ordinary cases of leased property, whether the lessor or lessee shall bear the burden of taxation is not a matter of public concern, but an obligation not to tax property leased by the State is a restriction of public import not lightly to be imposed.

In this case *held*, that the imposing of assessments for benefits on property in Seattle leased by the State of Washington is not an unconstitutional impairment of an implied covenant in the lease that the lessor will pay assessments.

Whether landlords or tenants shall pay taxes and assessments on leased property is a matter of private arrangement, and compelling tenants of the State to pay them does not deny them equal protection of the law because there may be a practice the other way in private leases.

Quære, whether exemption from taxation would not create a favored class and thus deny equal protection to other property owners.

When an interest in land, whether freehold or for years, passes from the public domain into private hands, there is a natural implication that it goes with the ordinary incidents of private property and subject to be taxed. *New York ex rel. Metropolitan Street Ry.* v. *Tax Commissioners*, 199 U. S. 1.

64 Washington, 102, affirmed.

THE facts, which involve the validity of assessments on lands leased by the City of Seattle to the plaintiffs in error, are stated in the opinion.

Mr. C. W. Corliss and *Mr. George McKay* for plaintiffs in error, submitted:

In leases such as these the lessor is bound to pay all taxes, assessments and other charges on the leased land, and the State, the same as a private lessor, is bound by this rule, though in such a case as this the State's covenant takes this form: the State agrees not to impose charges on the leased land and compel the lessee to pay the same.

The lands of the State in the absence of the State's consent are not subject to special assessment for local improvements. Constitution of the State, Art. VII, § 2; Hamilton on Special Assessments, § 281; *St. Louis* v. *Brown*, 155 Missouri, 545; *State* v. *Hartford*, 50 Connecticut, 89.

At the time the leases involved in this action were made no consent had been given by the State to the levying of special assessments on its land; the making of the leases did not subject the land to special assessment. *Daugherty* v. *Thompson*, 71 Texas, 192; *Davis* v. *Burnett*, 77 Texas, 3.

Nor was there any provision of the written or the common law splitting assessments against leased land between lessor and lessee.

The rule of the common law is that, in the absence of a covenant or condition to the contrary, there is an implied covenant in every lease that the lessor, not the lessee shall

pay all taxes and assessments levied on the leased land during the term. Taylor's Landlord and Tenant (7th ed.), p. 289, par. 341, § VI, c. 8; Woods' Landlord and Tenant, pp. 683, 684, § 417; 18 Am. and Eng. Ency. (2d ed.) 650; 32 Am. Digest, Century ed., pp. 578–587, §§ 519 to 529.

There is difference in this respect between a lease and a grant. In a grant there are no implied covenants, but the State, as lessor, is bound by the general rule the same as a private person. See *West. & Atl. R. Co.* v. *Georgia*, 14 L. R. A. 438, 455.

Under such conditions the State is regarded, *pro hac vice*, as a private person itself. *Murray* v. *Charleston*, 96 U. S. 432; *Hall* v. *Wisconsin*, 103 U. S. 5; *Davis* v. *Gray*, 16 Wall. 203; *Daggett* v. *Bonewitz*, 107 Indiana, 279; *Lessieur* v. *Price*, 12 How. 59; *Gray* v. *Coghlen*, 72 Indiana, 567.

States which issue negotiable paper incur the same responsibilities which attach to individuals or corporations in like case. *Bond Debt Cases*, 12 N. Car. 200, 272; *Floyd Acceptances*, 7 Wall. 666, and cases *supra*.

The statutes under which these leases were executed show clearly that the leases were intended to be ordinary leases, and subject to the legal incidents of such leases. See Laws of 1897, pp. 229–242, and 253, § 50; Laws of 1899, pp. 138, 139.

The rule that the State as lessor is bound by the same obligations as a private lessor is not qualified or overthrown by the rule that a legislative grant is construed most strongly in favor of the State and against the grantee. *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420. See also *Slidell* v. *Grandjean*, 111 U. S. 437; *Missionary Soc'y* v. *Dalles*, 107 U. S. 343; *Hancock* v. *McKinney*, 7 Texas, 445; *Dubuque &c. R. Co.* v. *Litchfield*, 23 How. 88; *Rice* v. *Minn. &c. R. R.*, 1 Black, 380.

The covenant of the State to pay all taxes and assess-

ments on the leased land during the term works a practical exemption of the leasehold from the payment of assessments on the leased land for the State cannot impose its burden by statute, on another, nor can the State pass a statute in direct violation of its contract. The lessor's covenant to pay the assessments takes the form, in this case, that the State will not impose burdens on the land and attempt to compel the lessee to discharge them. *Met. St. R. Co.* v. *Tax Comm.*, 199 U. S. 1; *Coast Line R. Co.* v. *Savannah*, 30 Fed. Rep. 646.

The statutes and ordinances authorizing these assessments impair the obligation of the State's lease, for the reason that by the statute and ordinances subsequent to the lease, the lessee is compelled, if these legislative acts are valid, to pay and discharge a burden imposed on the land, which burden is within the State's covenant with its lessee.

Nothing in the other provisions of the ordinance in any way qualifies this plain, clear legislative declaration that even the reassessment is against the land.

As matter of law and fact, special assessments are against the land. *Chicago &c. R. Co.* v. *Phillips*, 111 Iowa, 377; *Macon* v. *Patty*, 57 Mississippi, 378, 386; *New England M. S. Co.* v. *Vader*, 28 Fed. Rep. 265, 274.

The statutes authorizing the levy of special assessments against certain leases also deny to the lessees the equal protection of the laws.

The assessments take plaintiff's property without due process of law. *Coast Land Co.* v. *Seattle*, 52 Washington, 380, 383.

In *Coast Land Co.* v. *Seattle*, 52 Washington, 380, p. 383, and *Rabel* v. *Seattle*, 44 Washington, 482, there are *dicta* to the effect that a leasehold is subject to special assessment for a local improvement. As to future leases there is no objection to a statute which apportions between lessor and lessee the burden of taxes and assessments on

the leased land, but to make such a statute applicable to past leases is another thing.

Mr. Howard A. Hanson, with whom *Mr. William B. Allison* and *Mr. James E. Bradford* were on the brief, for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an attempt to reverse a judgment confirming an assessment on certain leaseholds of tide lands. The leases were executed by the State in 1899. Subsequent statutes of 1905 and 1907 respectively, authorized the assessment of such leaseholds for local improvements specially benefiting them, and the inclusion of them within local improvement districts by cities of the first class. The City of Seattle made a plank roadway, created an improvement district, levied an assessment which failed, *Coast Land Co. v. Seattle*, 52 Washington, 380, and then in due form levied the reassessment that is in question here. The plaintiffs in error argue that the leases contained an implied covenant for quiet enjoyment and that the subsequent laws that authorized the assessment impair their constitutional rights. Art. I, § 10. Amendment XIV, § 1. The Supreme Court of Washington, admitting the general rule as to leases, held that so far as concerns taxation, it did not apply to leases made by the State. 64 Washington, 102.

The concession of the court was that in private contracts "in the absence of a covenant or condition to the contrary, it is an implied covenant in every lease that the lessor shall pay all taxes and assessments levied on the leased land during the term." Stated in this form, the rule appears to be a rule of policy to which special considerations may set a limit. But it might be suggested that if the State should expressly covenant against such

assessments it could not impair the obligation of its contract by a subsequent law. The words used in these leases are 'lease, demise and let,' and from *Spencer's Case*, 5 Co. Rep. 16*a*, 17*a*, down to the present day these words have been said to imply a covenant. 1 Wms. Saund. 322, n. 2. *Mostyn* v. *West Mostyn Coal & Iron Co.*, 1 C. P. D. 145, 152. *Mershon* v. *Williams*, 63 N. J. L. 398, 406. Words express whatever meaning convention has attached to them, and so it may be argued that the State has covenanted against this tax in express terms.

Nevertheless it is obvious that the supposed meaning was not reached by simple interpretation. There is no suggestion of warranty in *dedi* or *demisi* by any usage of speech alone. The warranty was what Lord Coke called a warranty in law, Co. Litt. 384*a*, an institution, not depending upon an expression of intent, not arising because the words mean warrant, but imposed from without by the law. In Butler's note to this page the lessor's obligation is put as reciprocal to the tenant's obligation to pay rent, (compare 5 Co. Rep. 17*a*), just as the warranty in *dedi* in some cases was a consequence of tenure. One may wonder whether in fact the warranty incident to a sale in early law before the machinery of implied contracts was thought of (Glanv. VII, c. 2; X, c. 15; Lex. Sal. c. 47; 1 Löning, Vertragsbruch, 103; 2 Inst. 274, 275), was not given a scholastic turn, extended, limited and embodied in sacramental words—whether Glanville's *Donatores*, grantors, did not suggest the special effect of *dedi* in the Statute de Bigamis as interpreted by Lord Coke. (The Statute itself says that the feoffor is held *ratione doni proprii*. 4 Ed. I., c. 6.) But whatever may be the history, it is plain, as we have said, that the rule is not the result of interpretation but of doctrine; and hence it is that very commonly the rule is stated as expressing the general operation of a lease and not as depending upon the use of a particular word. 64 Washington, 102, 104. *J. W. Perry*

Co. v. *Norfolk*, 220 U. S. 472, 477. *Duncklee* v. *Webber*, 151 Massachusetts, 408, 411, and cases cited in 24 Cyc. 1057; 18 Am. & Eng. Encyc. of Law, 2d ed. 650. It has come back to what it started as being, a construction of the law; and since, notwithstanding its age, the special effect of *demisi* has not entered into speech so far as to reach popular understanding, the rule still may be construed as extending no further than reason dictates. Indeed warranties in law always have been dealt with on this principle. See e. g. *Brett* v. *Cumberland*, Cro. Jac. 521, 523. Therefore we may consider the question before us on the footing upon which it was discussed by the Supreme Court of the State.

The question is, then, whether our duty requires us to overthrow a decision that the policy of the state law excludes a constructive obligation to indemnify against the exercise of the sovereign power of taxation from leases by the State. Put in this form, it is not hard to answer. When the law creates an obligation outside of the expressed intent of the parties, it must consider all the circumstances, and the effect with reference to them. In ordinary cases the whole property is taxed and which party shall bear the burden is not a matter of public concern. But when the State makes the lease, the supposed obligation would be an obligation not to tax—a restriction of public import not lightly to be imposed. *Providence Bank* v. *Billings*, 4 Pet. 514, 561. *Wells* v. *Savannah*, 181 U. S. 531, 539, 540. *St. Louis* v. *United Railways Co.*, 210 U. S. 266, 273, 274. *J. W. Perry Co.* v. *Norfolk*, 220 U. S. 472, 480. It is urged that to deny the State's obligation discriminates unconstitutionally against this class of lessees, since all others are free from the burden. But that is not true. Whether landlord or tenant shall pay a tax is a matter of private arrangement, and the practice one way or the other has no bearing on the matter. The argument from inequality really works the other way. If these leaseholds are not

taxable, they are a favored class of property; for ordinarily leaseholds are taxed even if they are lumped and included in the value of the fee. When an interest in land, whether freehold or for years is severed from the public domain and put into private hands, the natural implication is that it goes there with the ordinary incidents of private property and therefore is subject to being taxed. See *New York ex rel. Metropolitan Street Ry. Co.* v. *New York State Board of Tax Commissioners*, 199 U. S. 1, 38.

The plaintiffs in error think that thus far there has been a failure to understand their contention that these assessments are against the land, and therefore are met by the supposed contract of the State, that the lessees should have the land free of all charges. The court below appears to us to have decided in direct response to that argument that the contract of the State did not go so far, and we are of opinion that we ought not to pronounce the decision wrong. There was some subsidiary discussion of the meaning and operation of the Statutes, but upon those matters we do not go behind the judgment of the Supreme Court of the State.

Judgment affirmed.